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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAUL A. STERN, ET AL,

Petitioners

vs.

TARRANT COUNTY HOSPITAL DISTRICT, ET AL,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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February 11, 1986

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APPENDIX

I. Opinion of the Court of Appeals *en banc*

II. Judgment on Rehearing *en banc*

III. Order denying reconsideration *en banc*

IV. Fifth Circuit Panel opinion (withdrawn)

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PAUL A. STERN, et al.,
Plaintiffs-Appellees,

v.

TARRANT COUNTY HOSPITAL DISTRICT,
Defendant-Appellant,

v.

GEORGE J. LUIBEL,
Defendant-Appellee.

No. 83-1638

OPINION

Filed December 18, 1985

Before: Clark, Chief Judge, Goldberg, Gee, Rubin, Reavley, Politz, Randall, Tate, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill and Jones, Circuit Judges.

Opinion by Judge Patrick E. Higginbotham;
Dissent by Judge Rubin, with whom Clark, Chief Judge, Politz, Tate, and Johnson, Circuit Judges, join dissenting

Appeal from the United States District Court
for the Northern District of Texas
Eldon B. Mahon, District Judge, Presiding

SUMMARY

Constitutional Law

Appeal from district court decision holding that a state hospital unconstitutionally denied five osteopathic physicians equal protection under the law and thereby violated the fourteenth amendment by denying the osteopaths staff privileges. Panel decision affirming district court vacated. District court judgment reversed upon *en banc* consideration.

The osteopaths and the John Peter Smith Hospital—operated by a Texas state agency—stipulated that the sole reason the plaintiffs were denied staff privileges was because they had trained in osteopathic-institution programs rather than in allopathic programs. The Texas state legislature in 1981 enacted the Medical Practice Act and declared its intention to prohibit state-agency hospitals from differentiating solely on the basis of the academic medical degree held by a licensed physician in determining medical staff appointments.

The district court concluded that there was no rational basis for the county hospital to treat allopaths and osteopaths differently, particularly in light of the contrary decision of the Texas legislature, as expressed in the Texas Medical Practice Act. The court thus struck down the hospital's rule as a violation of the equal protection clause. The panel opinion of this Court adopted a different rationale, but reached the same conclusion. The panel argued that the Texas legislature has expressed the determination that there are no appreciable differences in the allopathic and osteopathic medical degrees and found that there was an equal protection violation, implicitly concluding that there is no rational basis for the county hospital's rule. In the panel's view, the equal protection violation stems from the hospital's violation of state law. The concurring opinion endorsed the per se approach and suggested as an alternative rationale that the hospital's rule is a violation of the due process clause, finding a property interest in staff privileges because the legislature has commanded that those privileges not be denied on the basis of academic medical degree and that depriving plaintiff of this property interest was necessarily arbitrary and thus a violation of the fourteenth amendment.

[1] The per se approach is rejected. The guarantees of the fourteenth amendment, its requirement that state laws be applied in the same way to those entitled to equal treatment and its promise of protection from arbitrary or irrational state action, are guarantees that turn on federal constitutional standards of equality and rationality rather than on state standards.

[2] The outer constitutional limit imposed by the fourteenth amendment upon state power is that all the state's acts must be rational. In equal protection terms, if the legislative purpose is legitimate, a challenge may not prevail so long as the question of

rational relationship to the legislative purpose is at least debatable. Acts violative of the state legislature's chosen means, although by definition, contrary to state law, are not *ipso facto* contrary to the fourteenth amendment. The constitutional test for rationality of a legislative classification, whether the classes be distinguished in the text of the law or in its administration, is whether any rational decision maker could have so classified.

[3] A proper application of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), will not support the finding of an equal protection violation on the facts of this case. To the extent that the Supreme Court has addressed the point, it has confirmed the view that under *Yick Wo* state law does not define the equality or rationality guranteed by the fourteenth amendment. [4] That *Yick Wo*'s guarantee of equality in administration of laws turns on federal rather than state standards is also made plain in the Supreme Court's rules on selective prosecution. [5] These cases make plain that *Yick Wo* did not make state law the determinant of what classifications may be drawn under the fourteenth amendment. Recognizing that unconstitutional classes may be created in the administration of ostensibly neutral laws, *Yick Wo* forbids such classifications.

[6] Because the district court found differences between allopaths and osteopaths that are in this Court's view sufficient to permit Texas or its agencies to differentiate in the granting of hospital staff privileges, the district court's conclusion of unconstitutionality cannot stand. [7] A factual conclusion by the district court, based on conflicting evidence about an historical fact, would be binding in this Court. But such a factual conclusion could not be used to displace a legislative judgment and therefore could not be a sufficient basis for declaring the hospital district's action unconstitutional.

[8] The question is whether the legislature *could* have sanctioned the classification drawn by the hospital district without denying the osteopaths equal protection. If the district medical approaches adopted by allopaths and osteopaths provide a sufficient basis for such a classification, the inquiry ends. [9] In *Maceluch v. Wysong*, 680 F.2d 1062 (5th Cir. 1982), this Court concluded that the differences between allopathic and osteopathic schools in their approach to medical treatment justified the state's requirement that osteopaths identify themselves to medical consumers with the D.O.

label. In that case, this Court concluded that "the state has demonstrated a rational relationship between its licensing categories and debatable, if not real, differences between doctors possessing M.D. and D.O. degrees. This is all that the Constitution requires." **[10]** It is no less rational for the state, in the exercise of its police power, to make the same choice that *Maceluch* permitted it to give to its citizens. Nor does the choice become less rational when it is made by a state agency such as the hospital district here.

The dissent argued that the majority disregarded the plain language of the fourteenth amendment and the historic reasons for its enactment, for the equal protection clause forbids, and was intended to forbid, a statute to purposefully and arbitrarily deny to one class of persons the protection of state law that it affords to another class of persons.

OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge:

We reaffirm today the settled constitutional rule that state agencies may pursue legitimate purposes by any means having a conceivable rational relationship to those purposes. A decision that passes constitutional muster under the rational-basis test does not violate the equal protection clause simply because it violates a state anti-discrimination statute.

I

Five osteopaths were denied staff privileges by the John Peter Smith Hospital, which is operated by the Tarrant County Hospital District, a Texas state agency, because they had trained in an osteopathic-institution and not in an allopathic program. Their attack upon the constitutionality of this exclusion was sustained by the district court after a trial on the merits. The district court, 565 F.Supp. 1440, held that the hospital had unconstitutionally denied the osteopathic physicians equal protection under the law and thereby violated the fourteenth amendment. This judgment was affirmed by a divided panel of our court. A majority of the judges of this court voted to consider the case *en banc*, thereby vacating the panel opinion. It is the judgment of the district court that we now review.

The factual background, as recited by the panel, is as follows:

> John Peter Smith Hospital is operated by the Tarrant County Hospital District, a Texas state agency. Before 1974, the hospital bylaws permitted a physician to be a member of its staff only if he was a member of the Tarrant County Medical Society, an association which admitted only allopaths. In 1974, this was changed to require graduation with a degree of Doctor of Medicine (M.D.) from a school accredited by the Council on Medical Education of the American Medical Association. The Council accredits only allopathic schools and only allopathic schools award the M.D. degree; osteopathic schools award the degree Doctor of Osteopathy (D.O.). The requirements for admission to the hospital staff were again changed in 1979. The requirement of an M.D. degree was deleted, and instead, staff members were required to be licensed by the state and to have two years of post-doctoral training in a program accredited by the Accreditation Committee [on Graduate Medical Education]. [The Accreditation Committee is affiliated with the AMA and accredits only programs in institutions aligned with allopathic medicine.]
>
> . . . .
>
> The parties stipulated that the sole reason the plaintiffs were denied staff privileges was because they had trained in osteopathic-institution programs [rather than in programs approved by the Accreditation Committee] . . . .
>
> In 1981, the Texas state legislature enacted the Medical Practice Act and declared its intention "to prohibit [state-agency hospitals from differentiating] solely on the basis of the academic medical degree held by" a licensed physician in determining medical staff appointments. [Tex. Rev. Civ. Stat. Ann. art. 4495b, Subchapter A, § 1.02(9) (Vernon Supp. 1984).] The Act recognizes that

all physicians are examined by the same board, pass the same examination, and meet the same standards, "irrespective of academic medical degree." [*Id.*] In order to be licensed under the Act, a physician must have graduated from an approved medical school, but both schools accredited by the Accreditation Committee and those accredited by the American Osteopathic Association are approved.

[The plaintiffs in this case, Dr. Paul Stern and four other osteopaths, each of whom has had at least two years of post-doctoral training in a program accredited by the American Osteopathic Association, challenge the county hospital's refusal to grant them staff privileges.][1]

II

-1-

The district court held that the hospital's rule denying staff privileges to those who trained in osteopathic-institution programs violated the plaintiffs' fourteenth amendment right to equal protection of the laws. The court found no justification for the hospital's requirement, save to exclude osteopaths from the hospital staff. That exclusion was itself irrational, the court concluded, because there were no significant differences between the qualifications of allopaths and osteopaths.

The district court noted the contrary decision of the Supreme Court in *Hayman v. City of Galveston*, 273 U.S. 414 (1927), but refused to be bound by that case, given the changes in medical education requirements for osteopaths that had ensued in the fifty years since *Hayman* was decided. The court then characterized as dicta language in our own decision in *Berman v. Florida Medical Center, Inc.*, 600 F.2d 466 (5th Cir. 1979), which upheld a similar rule that denied staff privileges to osteopaths. The district court did not mention our decision in *Maceluch v. Wysong*, 680 F.2d 1062

[1] 755 F.2d 430, 432. This factual recitation by the panel is unchallenged, and we adopt it here.

(5th Cir. 1982), in which we rejected a challenge by osteopaths to Texas' prohibition of their use of the initials "M.D."

Being in its view free of binding precedent, the district court concluded that there was no rational basis for the county hospital to treat allopaths and osteopaths differently, particularly in light of the contrary decision by the Texas legislature, as expressed in the Texas Medical Practice Act. Accordingly, the court struck down the hospital's rule as a violation of the equal protection clause.

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The panel opinion adopted a different rationale but reached the same conclusion as the district court. Rather than hold *Hayman* outdated or distinguish *Berman* and *Maceluch*, the panel found "... it unnecessary to reach so far." 755 F.2d at 433. Arguing that the Texas legislature has, in the Texas Medical Practice Act, expressed the determination that there are no appreciable differences in the allopathic and osteopathic medical degrees and that the Act forbids state hospitals to confer or deny staff privileges "solely on the basis of academic medical degree," the panel found an equal protection violation, implicitly concluding that there is no rational basis for the county hospital's rule.

In the panel's view, the equal protection violation stems from the hospital's violation of state law, its apparent disregard of the state requirement that osteopaths and allopaths be treated equally:

> Because the state itself has required its agencies to treat allopathy and osteopathy alike, it is not necessary for us to consider whether the state might, if it chose to do so, find a rational basis for distinguishing between allopathic and osteopathic physicians generally. The Texas Medical Practice Act mandates that Texas institutions must accord equal treatment to professionals educated in either philosophy.

755 F.2d at 434.

Chief Judge Clark's concurring opinion endorsed this per se analysis and suggested an alternative rationale—that the county hospi-

tal's rule is unconstitutional as a violation of the due process clause. Chief Judge Clark found a property interest for osteopaths in staff privileges at the county hospital because the Texas legislature has commanded that staff privileges at such hospitals shall not be denied on the basis of academic medical degree. He then found that depriving the plaintiffs of this property interest was necessarily arbitrary and thus a violation of the fourteenth amendment. His reasoning parallels the per se analysis: regardless of the rationality of the state's choice under *Hayman* or *Berman*, Texas has decided that there is no reason to distinguish osteopaths and allopaths, and there can be no rational basis for its agencies to continue to do so.

III

[1] We reject a per se equal protection analysis. The guarantees of the fourteenth amendment, its requirement that state laws be applied in the same way to those entitled to equal treatment and its promise of protection from arbitrary or irrational state action, are guarantees that turn on federal constitutional standards of equality and rationality rather than on state standards. Converting alleged violations of state law into federal equal protection and due process claims improperly bootstraps state law into the Constitution. In doing so, this novel approach would expand the scope of the fourteenth amendment, would render its meaning less certain, and would serve no legitimate policy.

-1-

The per se equal protection construct purports not to overrule or otherwise conflict with our decisions in *Berman* and *Maceluch* or the Supreme Court's decision in *Hayman:* it would permit the concession, but find it irrelevant, that a rational state legislature or state agency *might* distinguish between allopaths and osteopaths without violating the fourteenth amendment. Under the per se approach, a violation of federal equal protection is nonetheless found because the Texas legislature has enjoined its state hospitals to treat allopaths and osteopaths alike.

[2] The per se approach assumes that by choosing to forbid discrimination against osteopaths, the state of Texas has necessarily made the contrary decision by its state-agency hospital an irratio-

nal one. We disagree. The outer constitutional limit imposed by the fourteenth amendment upon state power is that all the state's acts must be rational. In equal protection terms, if the legislative purpose be legitimate, a challenge "may not prevail so long as the question of rational relationship [to legislative purpose] is 'at least debatable.' " *Metropolitan Life Ins. Co. v. Ward*, 105 S.Ct. 1676, 1683 (1985) (quoting *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 674 (1981), and *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)). *Cf. City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976). When a legislature has a choice of means, each rationally related to its legislative purpose, it may constitutionally choose any of them. Its choice of one does not render the others irrational. It follows that acts violative of the chosen means, although by definition contrary to state law, are not *ipso facto* contrary to the fourteenth amendment. The constitutional test for rationality of a legislative classification, whether the classes be distinguished in the text of the law or in its administration, is whether *any* rational decisionmaker could have so classified.

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The per se analysis is said to find its sustenance, at least in part, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). *See* 755 F.2d at 433 & n.8. *Yick Wo*, however, does not support the conclusion. In *Yick Wo*, a San Francisco ordinance required consent from the Board of Supervisors before one could operate a laundry in a building made of materials other than brick or stone. The Board granted permits for laundries in wooden buildings to all non-Chinese applicants save one, and to none of 200 Chinese applicants. 118 U.S. at 359. The Court reversed Yick Wo's conviction under the ordinance on the ground that, although the law was facially neutral, it had been applied so as to deny Chinese citizens equal protection of the laws. *Id.* at 362-63.

The principle of the case, broadly stated, is that when a facially neutral statute is administered so as to create classes, those classes must pass constitutional muster. The court struck it down because the sole basis for the classification was "hostility to . . . race and nationality . . . which in the eye of the law is not justified. . . ." 118 U.S. at 874. Its rule differs from the central premise of the per se

approach: the panel in this case determined that a facially neutral statute may not constitutionally be administered so as to treat differently classes that *the state has determined* are similarly situated. The distinction between the two rules is significant. *Yick Wo* recognizes that facially neutral state laws present the opportunity for discrimination, because they can be administered in a discriminatory fashion. But *Yick Wo* does not replace the Constitution with state law as the benchmark that determines which classifications are permissible. That task is necessarily a matter of federal constitutional, not state, law. Similarly, as the Supreme Court has said of 42 U.S.C. § 1983:

> It is abundantly clear that *one* reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced *and* the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe v. Pape, 365 U.S. 167, 180 (1961) (emphasis added), *overruled in part on other grounds, Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). This statement summarizes the results of the Court's extensive review of the historical background of section 1983: federal courts are to afford a remedy only for such discriminatory enforcement of state laws as violates the independent guarantees of the fourteenth amendment.

[3] A proper application of *Yick Wo* will not support the finding of an equal protection violation on the facts of this case. To the extent that the Supreme Court has addressed the point, it has confirmed the view that under *Yick Wo* state law does not define the equality or rationality guaranteed by the fourteenth amendment. *See Snowden v. Hughes*, 321 U.S. 1 (1944). The selective prosecution cases, such as *Oyler v. Boles*, 368 U.S. 448 (1962), and its progeny, also make plain that per se analysis is impoverished.

In *Snowden* the Court addressed an equal protection claim by a candidate for the Illinois state legislature. The candidate received sufficient votes in the primary to be nominated and placed on the ballot, but was unable to get on the ballot because the State Primary

Canvassing Board intentionally refused to certify his election. The reasons for the board's refusal did not surface in the opinion, but the Court assumed that the Board had violated Illinois law by denying certification.

The Court found a number of flaws with the plaintiff's equal protection argument. The claim suffered from the same problem as that in the case at bar: although there was a showing that state law was violated, there was *no* showing that the violation also offended the federal equal protection clause. That is, the Court made clear that the rationality of the Board's decision was unaffected by the state legislature's prohibition of that decision. Since the legislature could constitutionally have written a statute that would have denied the plaintiff his nomination, the Board's decision to do so in violation of state law was necessarily also constitutional. Justice Stone wrote:

> [T]he action of the Board is . . . subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state statute can neither add to nor subtract from its constitutional validity. Mere violation of a state statute does not infringe the federal Constitution. . . . And state action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature. *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369-70. *See also Coulter v. Louisville & Nashville R. Co.*, [196 U.S. 599], 608-9; *Hayman v. Galveston*, 273 U.S. 414, 416; *Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 244. A state statute which provided that one nominee rather than two should be certified in a particular election district would not be unconstitutional on its face and would be open to attack only if it were shown, as it is not here, that the exclusion of one and the election of another were invidious and purposely discriminatory. Compare *Missouri v. Lewis*, 101 U.S. 22, 30, 32; *Yick Wo v. Hopkins, supra.*

321 U.S. at 11.

[4] That *Yick Wo*'s guarantee of equality in administration of the laws turns on *federal* rather than state standards is also made plain in the Court's rules on selective prosecution, the quintessential *Yick Wo* problem. In *Oyler v. Boles*, 368 U.S. 448 (1962), for example, the Court denied the equal protection claim of a West Virginia prisoner who was sentenced to life imprisonment under the state's three-time felony offender statute. The prisoner complained that the state had selectively enforced the statute against himself and other prisoners, but the Court explained that because *federal* standards of equality were not shown to have been violated in the discriminatory enforcement, no equal protection claim was stated:

> Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged.... *Cf. Snowden v. Hughes*, 321 U.S. 1 (1944); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (by implication).

Id. at 456. The court reaffirmed the same rule just this past term when it rejected the equal protection claim of a young man who refused to register for the draft and who was singled out for prosecution after he wrote letters to government officials stating that he would not register. *See Wayte v. United States*, 105 S.Ct. 1524 (1985). Our own court recently followed the principle as well, rejecting the selective-prosecution claims of striking air traffic controllers who failed to demonstrate that the government's decision to prosecute them was discriminatory enforcement that was "invidious or in bad faith in that it rest[ed] on such impermissible considerations as race, religion, or the desire to prevent [the] exercise of constitutional rights." *United States v. Hoover*, 727 F.2d 387, 389 (5th Cir. 1984) (quoting *United States v. Greene*, 697 F.2d 1229, 1234 (5th Cir.), *cert. denied*, 463 U.S. 1210 (1983)).

[5] Both *Snowden* and the selective prosecution cases make plain that *Yick Wo* did not make state law the determinant of what classifications may be drawn under the fourteenth amendment. Simply and correctly recognizing that unconstitutional classes may be cre-

ated in the administration of ostensibly neutral laws. *Yick Wo* forbids such classifications.

The panel also cited several cases in which federal *procedural* requirements were tied to state-created substantive rights. *Compare* 755 F.2d at 433-34 & nn. 12-13, *and id.* at 434-35 (Clark, C.J., concurring) *with id.* at 438 & n.8 (Goldberg, J., dissenting). It is of course quite true that, in our federal system, most property rights are created by state law. It has inexorably followed that the fourteenth amendment's due process clause operates to protect state-created property rights. The constitutional procedural standards of the due process clause are, however, wholly and exclusively federal in nature: a violation of state law is neither a necessary nor a sufficient condition for a finding of a due process violation. Indeed, as Judge Goldberg pointed out in dissent, *id.* at 438 n.8, none of the Supreme Court cases cited by the panel majority involved any violation of state law at all. It does not and cannot follow from these due process decisions that every apparent transgression of state law by a state agency triggers the operation of the federal equal protection clause.

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Whatever seeming logical force there might be to the argument that it is necessarily "irrational" and "arbitrary," in the federal constitutional sense, for a state agency intentionally to violate state law, that force quickly dissipates when the implications of the argument are considered. If state law defines who is entitled to what treatment or which means to a chosen goal are rational, then all intentional violations of state law by state agencies would violate the fourteenth amendment: if the action were taken against a class it would offend equal protection under the panel's per se construct, and if taken against an individual it would offend due process as defined by Chief Judge Clark.

One example of how the per se approach would transmogrify state law questions into constitutional claims springs readily to mind. In those jurisdictions that have adopted a state "equal rights amendment," ratification of the proposed federal ERA would be virtually superfluous because violations of the state ERA would simultaneously violate the fourteenth amendment. Furthermore,

federal courts would suddenly assume responsibility for determining the meaning of the state ERA's and would encounter many of the *Erie* difficulties that have bedeviled our exercise of diversity jurisdiction. Whenever a federal court determined that a person acting under color of state law had run afoul of one of these typically broad and vague state laws, it would conclude that "a state agency's discriminatory action when state law commands equality is a patent denial of equal protection to those denied equality." 755 F.2d at 432.[2]

The principle that federal constitutional protection is independent of state law is nothing new. In habeas review, we limit the issuance of the writ to those cases where there have been federal constitutional violations; we do not review all possible errors of state law. In *Pulley v. Harris*, 104 S.Ct. 871 (1984), for example, a prisoner under sentence of death was denied federal review of his claim that he had been denied the "comparative proportionality review" due him under state law: "A federal court may not issue the [habeas] writ on the basis of a perceived error of state law." *Id.* at 874-75. It would not be easy to explain why the Constitution requires federal supervision of the enforcement of state law for the benefit of those who wish to practice osteopathy but not for the protection of those facing execution at the hands of the state.

Our system of shared government power requires all the deference traditionally given in rational-basis review. Our lodestar is not what the state legislature has done or purported to do, but what *any* rational decisionmaker might have chosen to do. We may not be "lost in a maze if we put that compass by," but we certainly will be trespassing on state domains. State law is in no way demeaned or trivialized by its present status as state, rather than federal, law. The federal judiciary, for its part, has enough federal law to enforce without annexing new bodies of state legislation. We must, and

[2]In the case at bar, which involved a fairly precise state prohibition against differentiating in medical staff appointments "solely on the basis of the academic medical degree held by" a licensed physician, the district court had to engage in a complex and extended analysis in order to determine whether the state law had been violated. See 565 F.Supp. at 1445-52. In cases where state law is less clear, federal courts would face correspondingly greater difficulties and would to that extent be more prone to error.

will, leave violations of state law to be corrected by the appropriate state mechanisms.

IV

[6] Having rejected the panel's per se analysis, we undertake a review of the district court's judgment. Because the district court found differences between allopaths and osteopaths that are in our view sufficient to permit Texas or its agencies to differentiate in the granting of hospital staff privileges, that court's conclusion of unconstitutionality cannot stand.

[7] In the trial of constitutional issues, the differing roles of historical and legislative facts can present conceptual difficulties. We need not in this case attempt to distinguish precisely between historical and legislative facts in the district court's findings: however the findings be characterized, the state action in question was constitutional. The general distinction between legislative and adjudicative facts is nevertheless important because it helps to show why the district court ought to have asked only whether there was any conceivable basis for the Tarrant County Hospital District's implicit legislative judgment regarding the import of the differences between the two medical training programs. A factual conclusion by the district court, based on conflicting evidence about an historical fact, would be binding in this court. But such a factual conclusion could *not* be used to displace a legislative judgment and therefore could not be a sufficient basis for declaring the Hospital District's action unconstitutional.

After a bench trial, the district court found that the Hospital District's different treatment of allopaths and osteopaths was "not a requirement which has as a foundation a reasonable basis such as professional and ethical qualifications for the common good of the public or the hospital itself", 565 F. Supp. at 1454, and concluded that the facts today are different from those existing at the time of *Hayman v. City of Galveston*, 273 U.S. 414 (1927), *see* 565 F.Supp. at 1443. It is conceded that the facts allow only the conclusion that allopathic and osteopathic training programs have similar course requirements and content, and that graduates face identical testing and licensing requirements. We find no fault with the district court opinion in this respect and we approve that court's decision to use

the rational-relationship standard of review. We also agree that the Texas Medical Practice Act is relevant to, though not dispositive of, the question of whether there was a rational basis for differentiation.

[8] The difficulty is that the district court also concluded that "[t]he only remaining difference between D.O.'s and M.D.'s has been described simply as one of philosophy." 565 F.Supp. at 1443. Our question is whether the legislature *could* have sanctioned the classification drawn by the Tarrant County Hospital District without denying osteopaths equal protection. If the distinct medical approaches adopted by allopaths and osteopaths provide a sufficient basis for such a classification, our inquiry ends. *Cf. Home Depot, Inc. v. Guste*, No. 84-3532 (Oct. 10, 1985).

[9] In *Maceluch v. Wysong*, 680 F.2d 1062 (5th Cir. 1982), we concluded that the differences between the allopathic and osteopathic schools in their approach to medical treatment justified the state's requirement that osteopaths identify themselves to medical consumers with the "D.O." label. We adopted the opinion of the district court, which explained:

> Despite the fact that medicine is practiced within an objective scientific framework, the decisional processes of a physician reflect not only the aggregate of a substantive knowledge of clinical techniques, but also his judgments as to the need for, and nature of, treatment. That skill, born of experience, perception of human nature, and intuitions as to what is best for a patient, jumps over the many voids in "scientific" knowledge and separates the scientist from the doctor. It follows that two schools of medicine that advocate differing approaches, even if they differ only in their advocacy of differing philosophical approaches to the same scientific realities, present a difference that a legislature may note without unlawfully discriminating against one, or preferring one over the other.
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> . . . .
>
> In sum, the state has demonstrated a rational relationship between its licensing categories and debatable, if not

> real, differences between doctors possessing M.D. and D.O. degrees. That is all that the Constitution requires.

Id. at 1066-68 (citation omitted).

[10] The reasons underlying our decision in *Maceluch* also apply to the case at bar. We held that it was rational for the state to take steps to ensure that medical consumers could distinguish easily between allopaths and osteopaths. It is no less rational for a state, in the exercise of its police power, to make the same choice that *Maceluch* permitted it to give to its citizens. Nor does this choice become less rational when it is made by a state agency, such as the Tarrant County Hospital District. "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classifaction is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). The legislative facts involved in this case, as in *Maceluch*, are conceivably, if not indubitably, true.

The judgment of the district court is accordingly REVERSED.

ALVIN B. RUBIN, Circuit Judge, with whom CHARLES CLARK, Chief Judge, HENRY A. POLITZ, ALBERT TATE, and SAM D. JOHNSON, Circuit Judges, join dissenting:

The majority opinion refuses to prevent a state agency from discriminating against osteopathic physicians in favor of allopathic physicians in defiance of state law. In so doing, it disregards both the plain language of the fourteenth amendment and the historic reasons for its enactment, for the equal protection clause forbids, and was intended to forbid, a state to purposefully and arbitrarily deny to one class of persons the protection of a state law that it affords to another class of persons.

The majority, in addition, accords to the conclusions of a board of directors of a hospital district the same deference it extends to the enactments of a state legislature. It attaches the same presump-

tive validity to the decisions of every state agency, however petty or limited in its jurisdiction, that is extended to formal enactments of state statutes. In so reasoning, the majority disregards findings of fact directly contrary to the conclusion it reaches and fails to heed the mandate of rule 52(a) of the Federal Rules of Civil Procedure, adroitly sidestepping the rule's applicability of labeling the facts on review as "legislative" rather than "adjudicative." I must, therefore, respectfully dissent.

I.

The fourteenth amendment forbids any state to "deny to any person within its jurisdiction the equal protection of the laws." The amendment was not needed to ensure that the states provide equal protection of federal laws, for the text of the original Constitution makes federal law the supreme law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[1] The equal protection clause was needed and was intended to assure that the states afford to all persons the equal protection of their own laws. The Supreme Court certainly takes this view, for in *Monroe v. Pape*, it said of section 1983:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, *state laws might not be enforced* and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[2]

The majority seizes upon the single word "and" in this passage from *Monroe* and then asserts that federal equal protection is denied only when a state's failure to enforce its laws also constitutes a denial of a right, privilege or immunity secured by the Constitution. This is an unwarranted and unprecedented reading. The fourteenth amendment forbids the states *either* to "make or enforce any law which shall abridge the privileges or immunities of citizens of

[1]U.S. Const. art. VI, cl. 2.

[2]363 U.S. 167, 180, 81 S.Ct. 473, 480, 5 L.Ed.2d 492, ___ (1961) (emphasis added).

the United States" *or* to "deprive any person of life, liberty, or property, without due process of law" *or* "to deny to any person within its jurisdiction the equal protection of the laws." The sentence from *Monroe v. Pape* was not intended to limit the shield of the civil rights legislation to state action that denies *both* equal protection and citizenship privileges and immunities. Indeed, as that opinion continues, "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy. . . ."[3]

"It was not the unavailability of state remedies *but the failure of certain states to enforce the laws with an equal hand* that furnished the powerful momentum behind the 'force bill,' " *Monroe v. Pape*[4] continues. "While one main source of the evil—perhaps the leading one—was the Ku Klux Klan," the Court states, "the remedy created was not a remedy against it or its members but against those who representing a state in some capacity were *unable* or *unwilling* to enforce a state law. . . . There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty."[5] As Senator Howard, one of the sponsors of the amendment, stated, the purpose of the equal protection clause was to prohibit the states from

> denying to [any person] the equal protection of the laws *of the State*. This [clause] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.[6]

Before adoption of the fourteenth amendment, the states were not required by the Constitution to provide either due process or equal protection. The Bill of Rights, Chief Justice Marshall wrote in 1833, was "intended solely as a limitation on the exercise of power by the government of the United States, and is not applica-

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[3] *Id.* at 183, 81 S.Ct. at 482, 5 L.Ed.2d at —

[4] 365 U.S. 167, 174-75, 81 S.Ct. 473, 477, 5 L.Ed.2d 492, — (1961) (emphasis added).

[5] *Id.* at 176, 81 S.Ct. at 478, 5 L.Ed.2d at — (emphasis in original).

[6] 6 C. Fairman, *History of the Supreme Court of the United States—Reconstruction and Reunion 1864-88*, at 1925 (1971) (emphasis added).

ble to the legislation of the states."[7] The thirteenth amendment, which prohibited involuntary servitude, had been adopted in 1868. Some states responded by enacting laws that discriminated, either explicitly or implicitly, against the former slaves, for example, by the use of grandfather clauses. Many states also enforced apparently neutral laws in a discriminatory manner: crimes that were explicitly forbidden by state law were condoned when committed by whites against blacks.

To combat both kinds of discrimination, Congress enacted, over the veto of President Andrew Johnson, the first civil rights laws. There was doubt, however, whether Congress had the power to adopt these laws, and President Johnson had given the unconstitutionality of the legislation[8] as one reason for his veto. "Immediately pressing to [the fourteenth amendment] sponsors was the desire to provide a firm constitutional basis for the already enacted civil rights legislation."[9] Congress sought, in addition, to amend "the Constitution to place repeal beyond the accomplishment of a simple majority in a future Congress."[10]

While a major purpose of the equal protection clause was to prevent discrimination against blacks, it was not, as we know, confined to requiring equal treatment of the races for it assures equal protection of the laws to all "persons." Thus, the purpose of the equal protection clause of the fourteenth amendment was to forbid both kinds of unequal state action: the enactment of discriminatory laws and the discriminatory administration or enforcement of laws that were not themselves discriminatory.

The jurisprudence, however, has been concerned almost entirely with discriminatory laws, that is, with determining whether laws that are nondiscriminatory on their face are discriminatory in fact and whether classifications expressly drawn by state laws are consti-

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[7] *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833).

[8] *See Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 785-86 (1985).

[9] Congressional Research Service, Library of Congress, *The Constitution of the United States of America—Analysis and Interpretation* 1470 (1973).

[10] *Id.*

tutional. These cases continue to be considered writ-worthy by the Court.

The fact that the legal contest has been concentrated in this area should not, however, cause us to neglect consideration of the amendment's plain, but "majestically unconfined,"[11] language. In 1880, when the history and purpose of the fourteenth amendment were known to every justice, the Supreme Court interpreted the equal protection clause to prohibit discriminatory application of state law by a judge who excluded blacks from a jury because, in part, this was "outside his authority and in direct violation of the spirit of the *State statute*. That statute gave him no authority, when selecting jurors . . . to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion."[12]

While that case involved the criminal portions of the Civil Rights Acts and racial discrimination, its rationale was not based on the later-developed differential scrutiny theory but on the simple thesis that it was a denial of equal protection for a state agent to discriminate against a class of people in violation of state law. Similarly, in dicta, a circuit court sitting in Alabama in 1871 said in *United States v. Hall*:[13]

> [T]he fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.

A state official who intentionally treats two classes of people differently in the face of a valid state law that implies equal treatment violates the equal protection guarantee. A century ago in *Yick Wo*

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[11]Congressional Research Service, *supra* note 5, at 1471.

[12]*Ex Parte* Virginia, 100 U.S. 339, 348 (1880) (emphasis added).

[13]26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282).

v. Hopkins.[14] the Court held unconstitutional the administration of a municipal ordinance that denied "a particular class of persons," Chinese laundry owners, permits that were granted to others who were not Chinese. The case presented here involves an even more egregious denial of equal protection—intentional discrimination in defiance of a state law that exacts, not merely implies, equal treatment. The majority opinion agrees that Texas law requires two classes of persons, doctors holding the M.D. degree and doctors holding the D.O. degree, to be treated alike. The majority opinion agrees that the Tarrant County Hospital District has violated that law and, at least inferentially, accepts the conclusion that this discrimination between the two classes of persons is purposeful. This, I submit, is enough to make the Hospital District's action a denial of equal protection.

The majority opinion relies upon a lengthy quotation from *Snowden v. Hughes*.[15] But it fails to include another statement of the *Snowden* court that directly conflicts with the rationale the majority opinion espouses. At the outset of its discussion of the equal protection clause in *Snowden*, the Supreme Court said:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection *unless there is shown to be present in it an element of intentional or purposeful discrimination*.[16]

"This [discrimination] may appear on the face of the action taken with respect to a particular class or person," the Court continued, "or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. . . ."[17] Snowden himself did not qualify for the equal protection guarantee because he did not even allege "a purposeful discrimination between persons or classes of persons."[18] "So far as appears the [Illinois State] Board's failure to

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[14] 118 U.S. 356, ___, 6 S.Ct. 1064, 1073, 30 L.Ed. 220, ___ (1886).

[15] 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed 497 (1944).

[16] *Id.* at 8, 64 S.Ct. at 401, 88 L.Ed. at ___ (emphasis added).

[17] *Id.*, 64 S.Ct. at 401, 88 L.Ed at ___ (citations omitted).

[18] *Id.* at 10, 64 S.Ct. at 402, 88 L.Ed at ___.

certify petitioner was unaffected by and unrelated to the certification of any other nominee,"[19] the Court said. Absent such purposeful discrimination between classes of persons, the Illinois State Board's action was not a denial of equal protection of the law.

The majority's reliance on the opinion in *Oyler v. Boles*,[20] a discriminatory prosecution case, is no more justified. As the majority's quotation notes, and disregards, the Supreme Court there held that selective law enforcement "is not *in itself* a federal constitutional violation" *unless* "the selection was deliberately based upon an unjustifiable standard *such as* [but, I suggest, not limited to] race, religion, or other arbitrary classification."[21]

The scope and applicability of the equal protection clause are, of course, determined by federal standards. The validity of the Texas statute being unchallenged, discrimination in its administration violates the federal constitution.

II.

The majority opinion starts with a bland statement of law: rational state action does not violate the equal protection clause simply because it violates a state anti-discrimination statute. The action of the Tarrant County Hospital District is not so innocuous. Stating the rule in this fashion begs the questions put by this case: whether there is in fact a rational basis for the state action and whether a subordinate state agency acts rationally when it defies state law and discriminates against one class of persons while favoring another.

The state or a state agency may, without denying equal protection, make a distinction between two classes of persons if the purpose of making the distinction is lawful and the distinction is rationally related to a legitimate state purpose. Once, however, the state adopts a statute affirmatively requiring that two classes of persons be treated alike, a state agency may not decree either lawfully or rationally that, despite what the legislature says, it is still going to discriminate. I suggest that it is *per se* not only unlawful, but arbi-

[19] *Id.*, 64 S.Ct. at 402, 88 L.Ed. at ___

[20] 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962).

[21] *Id.* at 456, 82 S.Ct. at 506, 7 L.Ed.2d at ___ (emphasis added).

trary and capricious, hence not rational, for a state agency intentionally to create a discriminatory classification forbidden by a valid state law.

The state did not grant Tarrant County Hospital District any discretion to consider, with respect to a physician's qualifications, the nature of the physician's medical degree, allopathic or osteopathic. This case, therefore, presents a situation distinguishable from that typically found in "selective enforcement" cases. In such cases, state law often accords state agencies, such as zoning or liquor licensing boards, a great deal of discretion. This case is different. To prevail on equal protection grounds, the plaintiff here need only show that (1) he is a member of a class of persons who have been discriminated against on the basis of their membership in that class; (2) members of other classes, otherwise similarly situated, have been treated differently; and (3) the discriminatory treatment was purposeful.

The actions of the Tarrant County Hospital District were patently discriminatory and were taken in violation of a state statute that denied it any discretion. Its actions obviously did not further what the state legislature had determined to be a legitimate state purpose. The District purposefully denied to osteopaths the protection of the law it granted to allopaths.[22] In so doing it denied plaintiffs the equal protection of state law, and this in turn constituted a violation of the constitutional guarantee of equal protection.

The majority concedes the "seeming logical force"[23] of this analysis by what first year law students will recognize as the slippery slope argument: to accept the thesis might lead to dread consequences. Violation of a state equal rights amendment might be a federal constitutional violation. That contention, however, portends no disaster. Purposeful discrimination *by a state agency* against a class of persons in order to favor another class in deliberate disregard of a valid state law—even (or perhaps especially) an equal rights law—constitutes a denial of equal protection.

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[22] *Cf. Ex Parte* Virginia, 100 U.S. 339, 348 (1880).

[23] Majority opinion, p. 1629.

The action of the Tarrant County Hospital District was not merely a violation of state law that might be remedied in the state courts. It was also a violation of the Constitution. A federal court, district or appellate, cannot ignore its duty simply because an alleged constitutional violation may also be contrary to state law or because the constitutional claim may require the court "to engage in a complex and extended analysis"[24] of a "typically broad and vague state law."[25]

III.

The majority opinion rests on the premise that the Hospital District acted rationally in pursuit of a legitimate state purpose. Rationality, however, is not a purely subjective judgment. "Rational" means "based on reason." Reason rests on facts. The action of the Hospital District was, as the district court found, unreasonable. Based on testimony adduced before it, not merely on conjecture as to possible reasons for the District's action, the court concluded that, for purposes of admission to practice in the hospital, no significant differences existed between the post-graduate training of allopaths and osteopaths.

As the majority opinion notes, the district court found that the Hospital District's different treatment of allopaths and osteopaths was not founded on a "reasonable basis such as professional and ethical qualifications for the common good of the public or the hospital itself."[26] "It is conceded," the majority states, "that the facts allow only the conclusion that allopathic and osteopathic training programs have similar course requirements and content, and that graduates face identical testing and licensing requirements."[27] And it adds, "[w]e find no fault with the district court opinion in this respect."[28] Nevertheless, the majority opinion ignores all of these facts on the basis that, if the legislature might validly have discriminated against osteopaths, the Hospital District may do so—without regard to the facts.

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[24]Majority opinion, p. 1630 n.2.

[25]Majority opinion, p. 1630.

[26]*Stern v. Tarrant County Hosp. Dist.*, 565 F.Supp. 1440, 1454.

[27]Majority opinion, p. 1631.

[28]Majority opinion, p. 1631.

The majority opinion does not even mention Fed. R. Civ. P. 52(a), which requires that the facts found by a district court are to be accepted on appeal unless clearly erroneous. Whether there is a rational basis for treating differently two classes of persons must, I submit, turn on the facts distinguishing these classes as shown by the evidence. The majority seeks to justify its disregard of the evidence and the fact findings by asserting that the validity of the discrimination against osteopaths is to be determined by something called "legislative" facts rather than "adjudicative" or historical facts. But "legislative" facts, it turns out, are not facts at all. They are, in this instance, assumptions utilized to uphold the state agency's disregard of the facts. District courts are apparently not to take evidence when the actions of inferior state agencies are challenged, but are instead only to determine whether there is "any *conceivable* basis for the [agency's] implicit legislative judgment."[29] The agency's mind having been made up, neither the agency nor the court is to be confused by the facts, and the court is to evaluate only the agency lawyer's post-hoc suggestion of a conceivable basis that might have been in the agency's mind—even if it was not.

Even when factual findings are of constitutional importance and an appellate court is not bound by rule 52(a), the appellate court undertakes to review the facts independently. The Supreme Court and this court do not hypothesize but determine the facts from the evidence.[30]

We have repeatedly rejected the suggestion that the actions of a federal administrative agency might be validated on the basis of rationalizations developed by counsel.[31] While we presume valid and accord deference to determinations made by state legislatures,[32] we do so at least in part because the legislature is the highest state law-making agency, elected by a democratic process,

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[29]Majority opinion, p. 1631.

[30]*Bose Corp. v. Consumers Union of U.S., Inc.*, ___ U.S. ___ 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984); *Jones v. Diamond*, 636 F.2d 1364, 1370 & n.7 (5th Cir. 1981); *see also Cousins v. City Council*, 466 F.2d 830, 837 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972).

[31]*See, e.g., United States v. New Orleans Public Service*, 723 F.2d 422, 428-29 (5th Cir. 1984).

[32]*See, e.g., Home Depot, Inc. v. Guste*, No. 84-3532 (Oct. 10, 1985).

enacts statutes in a deliberative manner, and its enactments become law only if approved by the state's highest executive or reenacted by a substantial majority over his veto. In *New Orleans v. Dukes*,[33] this deference was extended to a municipal ordinance, adopted in legislative fashion, in which the city's objective in enacting the ordinance was clearly identified. But as Justice Powell said in dissenting from the Court's opinion in *Schweiker v. Wilson*,[34] "The deference to which legislative accommodation of conflicting interests is entitled rests in part upon the principle that the political process of our majoritarian democracy responds to the wishes of the people." No similar deliberations are exacted of appointed state agencies and no similar deferential presumption of constitutionality attends their actions. Deference of this extreme sort is hardly due to the decision of a hospital board, a majority of whose members are allopathic physicians, made without hearings or evidence, to exclude osteopathic physicians. Instead, it seems to me, we should view such self-serving decisions with at least some measure of skepticism.

Justice Powell has said, "when a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy as its absence."[35] Moreover, at least one fact that is undoubtedly legislative cannot be ignored: The Texas state legislature has declared unlawful what its creature, the Tarrant County Hospital District, has chosen to do. Even if this is not decisive, it is a fact that must be considered in determining both the rationality of the District's actions and whether its actions are to be accorded the deference given a state legislature's deliberate enactments.

The majority opinion puts the Constitution at the mercy of every

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[33]427 U.S. 297, 304, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511, — (1976).

[34]450 U.S. 221, 243, 101 S.Ct. 1074, 1087, 67 L.Ed.2d 186, — (1981); *cf. Regents of the University of California v. Bakke*, 438 U.S. 265, — 98 S.Ct. 2733, 2758, 57 L.Ed.2d 750, — (1978); *see also Kramer v. Union Free School Dist., No. 15*, 395 U.S. 621, 639, 89 S.Ct. 1886, 1895-96, 23 L.Ed.2d 583, — (1969) (Steward, J. dissenting).

[35]*Schweiker v. Wilson*, 450 U.S. 221, 243, 101 S.Ct. 1074, 1087, 67 L.Ed.2d 186, — (1981).

petty state agency if only its lawyers can submit a thesis, unsupported by factual evidence, that *might* support constitutionality. The opinion cannot be supported by the Supreme Court decision in *Haymon v. City of Galveston*,[36] for evidence of the kind here presented was not in the record before that Court.

The opinion in *Haymon*, moreover, rested at least in part on the conclusion that the action of the Galveston Hospital Board in discriminating against osteopaths did not violate the Texas constitutional provision that forbids any preference to "be given by law to any *schools* of medicine."[37] The Court found that the state constitutional limitation was directed only to the qualifications of those to be *admitted* to medical practice in the state and did not limit consideration of medical practitioners' qualifications to *practice* in a state hospital.[38]

Since *Haymon* significant changes have occurred in the education, training, and licensing of osteopaths and in Texas law. That state action was not arbitrary under facts existing a half century ago does not make it rational today. The decision of a panel of this court in *Berman v. Florida Medical Center, Inc.*[39] is no more confining, for that case dealt with a private hospital and did not involve state action.

IV.

The fourteenth amendment forbids the state and its agencies to discriminate against any class of persons. It is a bulwark against prejudice, against state action that condemns without rational basis. The clause was adopted to assure not only that states enact nondiscriminatory laws but also that they administer state law equally and fairly. The majority opinion refuses to apply the literal mandate of the Constitution and ignores the history that led to its enactment. It condones the bigotry of an allopathic-dominated state hospital district that refuses to be bothered by either the state law, the federal constitution, or the facts.

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[36]273 U.S. 414, 47 S.Ct. 363, 71 L.Ed 714 (192[illegible]

[37]Tex. Const. art. 16 § 31.

[38]273 U.S. at 418, 47 S.Ct. at 364, 71 L.Ed. at ___

[39]600 F.2d 466 (5th Cir. 1979).

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-1638

D. C. Docket No. CA-4-80-281-E

PAUL A. STERN, ET AL.,

Plaintiffs-Appellees,

versus

TARRANT COUNTY HOSPITAL DISTRICT,

Defendant-Appellant,

versus

GEORGE J. LUIBEL,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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Before CLARK, Chief Judge, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL and JONES, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bears its own costs on appeal.

RUBIN, with whom CLARK, Chief Judge, POLITZ, TATE and JOHNSON, Circuit Judges, join dissenting.

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-1638

PAUL A. STERN, ET AL.,

Plaintiffs-Appellees,

versus

TARRANT COUNTY HOSPITAL DISTRICT,

Defendant-Appellant,

versus

GEORGE J. LUIBEL,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING
(January 14, 1986)

Before CLARK, Chief Judge, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

PAUL A. STERN, ET AL.,
Plaintiffs-Appellees,

v.

TARRANT COUNTY HOSPITAL DISTRICT,
Defendant-Appellant,

v.

GEORGE J. LUIBEL,
Defendant-Appellee.

No. 83-1638.

United States Court of Appeals,
Fifth Circuit.

March 18, 1985.

Five licensed physicians, each of whom had at least two years of postdoctoral training in a program accredited by the American Osteopathic Association, challenged constitutionally of a requirement imposed by a state-agency hospital that, to practice in the hospital, a physician must have completed two years of postdoctoral training in a program accredited by the Accreditation Committee on Graduate Medical Education, which accredits only programs in institutions aligned with allopathic medicine. The United States District Court for the Northern District of Texas, Eldon B. Mahon, J., 565 F.Supp. 1440, entered judgment on finding that hospital rule unconstitutionally denied osteopathic physicians equal protection of the laws. An appeal was taken. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that hospital's rule unconstitutionally denied osteopathic physicians equal protection of the laws.

Affirmed.

Clark, Chief Judge, concurred and filed an opinion.

Goldberg, Circuit Judge, dissented and filed an opinion.

1. Constitutional Law Key 211(3)

Equal protection of the law requires not only that statutes be equal on their face but also that they be executed so as not to deny equality. U.S.C.A. Const. Amend. 14.

2. Constitutional Law Key 213(2)

Fact that discriminatory action is taken by a state agency other than legislature does not permit it to escape Fourteenth Amendment for state action, of the kind that falls within prescription of equal protection clause of the Fourteenth Amendment, may be brought about through state's administrative and regulatory agencies just as through the legislature. U.S.C.A. Const. Amend. 14.

3. Constitutional Law Key 238(1)
Hospitals Key 6

Requirement imposed by a state-agency hospital that, to practice in hospital, a physician must have completed two years of postdoctoral training in a program accredited by the Accreditation Committee on Graduate Medical Education, which accredits only programs in institutions aligned with allopathic medicine, unconstitutionally denied osteopathic physicians who had at least two years of postdoctoral training in a program accredited by the American Osteopathic Association equal protection of the laws in view of Texas statute forbidding state agencies to differentiate among physicians solely on basis of their academic medical degrees. U.S.C.A. Const. Amend. 14; Vernon's Ann.Texas Civ.St.art. 4495b.

4. Constitutional Law Key 82(1)

Federal constitutional protection may turn on state-created rights.

5. Constitutional Law Key 277(2)

Whether a state employee who has been discharged without notice and hearing has been denied property without due process depends on whether he had state-created rights that created a cognizable property interest in his continued employment. U.S.C.A. Const.Amends. 5, 14.

6. Constitutional Law Key 278.5(5)

When state creates a school system, it creates an entitlement in students, giving them a right to attend unless that right is terminated with due process of law. U.S.C.A. Const.Amends. 5, 14.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, GOLDBERG, and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

A Texas statute forbids state agencies to differentiate among physicians solely on the basis of their academic medical degrees.[1] Five licensed physicians, each of whom has had at least two years of post-doctoral training in a program accredited by the American Osteopathic Association, challenge the constitutionality of a requirement imposed by a state-agency hospital that, to practice in the hospital, a physician must have completed two years of post-doctoral training in a program accredited by the Accreditation Committee on Graduate Medical Education, which accredits only programs in institutions aligned with allopathic medicine. The district court, 565 F.Supp. 1440, held that the hospital rule unconstitutionally denied osteopathic physicians equal protection of the laws, in

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[1] Texas Medical Practice Act, Tex.Rev.Civ.Stat.Ann. art. 4495b (Vernon Supp.1984).

violation of the fourteenth amendment. We affirm the judgment on the basis that a state agency's discriminatory action when state law commands equality is a patent denial of equal protection to those denied equality.

I.

John Peter Smith Hospital is operated by the Tarrant County Hospital District, a Texas state agency. Before 1974, the hospital bylaws permitted a physician to be a member of its staff only if he was a member of the Tarrant County Medical Society, an association which admitted only allopaths. In 1974, this was changed to require graduation with a degree of Doctor of Medicine (M.D.) from a school accredited by the Council on Medical Education of the American Medical Association. The Council accredits only allopathic schools and only allopathic schools award the M.D. degree; osteopathic schools award the degree Doctor of Osteopathy (D.O.). The requirements for admission to the hospital staff were again changed in 1979. The requirement of an M.D. degree was deleted, and instead, staff members were required to be licensed by the state and to have two years of post-doctoral training in a program accredited by the Accreditation Committee.

The predecessor to the Accreditation Committee[2] was created in 1970, and none of the graduate training programs that existed before that time were accredited by it. To avoid disqualifying physicians who received training before 1970, the bylaws of the hospital were rewritten in 1980 and 1981 to require post-doctoral training in a program accredited by the Committee only for initial appointment to the staff. Physicians

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[2] The accrediting group was originally the Liason Committee on Graduate Medical Education. This was changed in 1981 to the Accreditation Committee.

already on the staff were thus automatically exempted from the requirement.

The parties stipulated that the sole reason the plaintiffs were denied staff privileges was because they had trained in osteopathic-institution programs. There are presently four osteopathic physicians on the staff of the hospital. Each of them, however, received post-doctoral training while in military service at hospitals approved by the predecessor to the Accreditation Committee.

In 1981, the Texas state legislature enacted the Medical Practice Act and declared its intention "to prohibit differentiation solely on the basis of the academic medical degree held by" a licensed physician in determining medical staff appointments.[3] The Act recognizes that all physicians are examined by the same board, pass the same examination, and meet the same standards "irrespective of academic medical degree."[4] In order to be licensed under the Act, a physician must have graduated from an approved medical school, but both schools accredited by the Accreditation Committee and those accredited by the American Osteopathic Association are approved.

In findings not challenged on appeal, the district court found that presently there is no substantial difference between accredited medical schools conferring the M.D. degree and those that confer the D.O. degree except that students attending osteopathic schools are required to take several courses on manipulative therapy. The court described as non-substantial the philosophical differences between allopathy and osteopathy.

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[3] Tex.Rev.Civ.Stat.Ann. art. 4495b, Subchapter A, § 1.02(9) (Vernon Supp.1984).

[4] *Id.*

Until recently, osteopathic physicians were unable to obtain training in programs approved by the Accreditation Committee on Graduate Medical Education. Today, as we understand the record, they are able to do so in various governmental programs and certain other specialized programs.

II.

The parties raise a number of issues, including whether it is reasonable for a hospital to treat allopathic and osteopathic physicians differently. Because of the later changes in medical education, the hospital invites us to follow, and the osteopathic physicians urge us to disregard, the Supreme Court's 1927 decision in *Hayman v. City of Galveston.*[5] The Court there held that a hospital's decision to exclude osteopaths was neither arbitrary nor unreasonable because it was based on the necessity of choosing between various methods of treatment. In the same opposing fashion, the parties also urge us to affirm or to reconsider and reject the statements in our opinion in *Berman v. Florida Medical Center, Inc.,*[6] an action dismissed because it involved a private hospital, but in which we said that a public hospital may deny staff privileges to a physician simply because he is an osteopathic physician.[7]

[1, 2] We find it unnecessary to reach so far. Equal protection of the law requires not only that statutes be equal on their face but also that they be executed so as not to deny equality.[8]

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[5] 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714 (1927).

[6] 600 F.2d 466 (5th Cir.1979).

[7] *But see Dooley v. Barberton Citizen's Hospital,* 11 Ohio St.3d 216, 465 N.E.2d 58 (1984) (hospital may not adopt standards for staff membership that are not reasonably related to accepted measures of skill, education and competence).

[8] *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

"A law that is administered so as to unjustly discriminate between persons similarly situated may deny equal protection."[9] There is even more striking administrative discrimination when a state law that ordains equal treatment is applied so as to deny that equality the statute requires. The fact that the discriminatory action is taken by a state agency other than the legislature does not permit it to escape the fourteenth amendment for "state action, of the kind that falls within the prescription of the Equal Protection Clause of the Fourteenth Amendment, may be brought about through the state's administrative and regulatory agencies just as through the legislature."[10]

[3] The Texas Medical Practice act expressly mandates that Texas institutions accord equal treatment "to all who desire to practice medicine, irrespective of academic medical degree."[11] Thus, the Texas legislature has determined that, for purposes of determining medical staff appointments, osteopathic and allopathic physicians are "similarly situated." Because the Tarrant County Hospital District's bylaws discriminate between persons similarly situated, those osteopathic physicians who are now excluded from admission to the hospital staff solely because their training was in a program approved by the American Osteopathic Association rather than by the Accreditation Committee have been denied the equality afforded them by Texas law.

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[9] *Guillory v. County of Orange,* 731 F.2d 1379, 1383 (9th Cir.1984); *Kuzinich v. County of Santa Clara,* 689 F.2d 1345, 1349 (9th Cir.1982); *Zeigler v. Jackson,* 638 F.2d 776, 779 (5th Cir.1981).

[10] *Robinson v. State of Florida,* 378 U.S. 153, 156, 84 S.Ct. 1693, 1695, 12 L.Ed.2d 771 (1964); *see Columbus Board of Education v. Penick,* 443 U.S. 449, 457 fn. 5, 99 S.Ct. 2941, 2946 fn. 5, 61 L.Ed.2d 666 (1979).

[11] Tex.Rev.Civ.Stat.Ann. art. 4495b, Subchapter A, § 1.02(9) (Vernon Supp.1984).

[4–6] Federal constitutional protection may turn on state-created rights. Thus, whether a state employee who has been discharged without notice and hearing has been denied property without due process depends on whether he had state-created rights that created a cognizable property interest in his continued employment.[12] Similarly, when the state creates a school system, it creates an entitlement in students, giving them a right to attend unless that right is terminated with due process of law.[13]

Because the state itself has required its agencies to treat allopathy and osteopathy alike, it is not necessary for us to consider whether the state might, if it chose to do so, find a rational basis for distinguishing between allopathic and osteopathic physicians generally. The Texas Medical Practice Act mandates that Texas institutions must accord equal treatment to professionals educated in either philosophy.

The hospital contends that, because the Act was adopted in 1981, it is not applicable in this case which concerns a standard adopted in 1979. This disregards both the nature of this action, a suit to affect future, instead of past, actions, and the rule stated by the Supreme Court in *Bradley v. School Board of the City of Richmond:*[14] "[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in

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[12] *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 578, 92 S.Ct. 2701, 2709-10, 33 L.Ed.2d 548 (1972). *See also Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430-31, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982); *Jones v. Orleans Parish School Board,* 679 F.2d 32, 36 (5th Cir.1982), *cert. denied,* 461 U.S. 951, 103 S.Ct. 2420, 77 L.Ed.2d 1310 (1983).

[13] *Goss v. Lopez,* 419 U.S. 565, 573-74, 95 S.Ct. 729, 735-36, 42 L.Ed.2d 725 (1975); *Debra P. v. Turlington,* 644 F.2d 397, 403-04 (5th Cir.1981).

[14] 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974).

manifest injustice or there is statutory direction or legislative history to the contrary."[15]

The hospital makes the sophistic argument that its admission requirement does not turn on the physician's academic medical degree, but on the nature of the institution at which he received his post-doctoral training. Those physicians who were excluded by the requirement, however, were prevented from receiving training in a program acceptable to the Accreditation Committee by the fact that they had D.O. degrees, and they were able to receive equivalent training only in an osteopathic-institution program. The nature of their academic medical degree, therefore, is the differentiating factor.

For these reasons, the judgment is affirmed insofar as it applies to osteopathic physicians who received their post-doctoral training before they could be admitted to a program accredited by the Accreditation Committee. Because the question was not presented below and not urged to us on appeal, we express no opinion on the constitutionality of the hospital rule as applied to osteopaths who now have, or who have had in the past, the opportunity, equally with allopaths, to attend a training program accredited by the Accreditation Committee, but choose not to exercise that option.

The district court judgment is, therefore, AFFIRMED.

CLARK, Chief Judge, concurring:

I concur without reservation in what Judge Rubin writes. I add these comments because I regard the dissent's reliance on *McDowell v. Texas* as misplaced. 465 F.2d 1342 (5th Cir.1971),

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[15] *Id.* at 711, 94 S.Ct. at 2016, 40 L.Ed.2d 476 (1979). The Fifth Circuit, of course, follows the Supreme Court's enunciation. *See Petrou Fisheries, Inc. v. I.C.C.*, 727 F.2d 542, 545 (5th Cir. 1984); *Sandefur v. Cherry*, 718 F.2d 682, 684 (5th Cir.1983).

aff'd on rehearing en banc, 465 F.2d 1349 (5th Cir.1972), *cert. denied,* 410 U.S. 943, 93 S.Ct. 1371, 35 L.Ed.2d 610 (1973).

The essential distinction between today's case and *McDowell* lies in the nature of the right affected. Dr. McDowell's claim was based on his dismissal from a non-tenured position as administrator of a Texas institution for retarded children. He asserted that his dismissal resulted from his refusal to violate state law by admitting to his institution a child not entitled to admission. The proof established that Dr. McDowell's discharge caused him no stigma nor injury to his reputation. Indeed, he immediately received many offers for employment and promptly accepted one at an increase in pay. Thus, we held that no federal constitutional right was asserted in the discharge. The only violation of state law involved merely furnished the occasion for the state to act to terminate his at-will employment. Both *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), and *Board of Regents v. Roth,* 408 U.S. 594, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), intervened between the *McDowell* panel and en banc opinions to furnish confirmation satisfactory to a unanimous court that the property right asserted by Dr. McDowell was not of a nature which was cognizable under the fourteenth amendment.

Dr. Stern's case is altogether different. The law of the State of Texas expressly requires that his medical degree be accepted as the equivalent of that possessed by an allopathic doctor. But, the John Peter Smith Hospital refuses to accord him the concomitant right to staff privileges which Texas has granted.

This arbitrary state action depriving Dr. Stern of the right to practice his profession in a state hospital deprives him of a property right clearly within the protection of the fourteenth amendment. In *Roth,* the Supreme Court explained the attributes of "property" interests which come within the ambit of the Federal Constitution in these terms:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined . . . .
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understanding that secure certain benefits and that support claims of entitlement to those benefits . . . ."

408 U.S. at 577, 92 S.Ct. at 2709.

In *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982), the Court further stated:

> The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." . . . Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating "to the whole domain of social and economic fact." (Citations omitted.)

Neither *Hayman* nor *Berman* viewed hospital staff privileges as beyond the reach of federal constitutional protection because the nature of staff privileges was unimportant. Rather, the analysis in those cases turned on the rationality of the state's choice to prefer allopathy over osteopathy. Each found that the state action in distinguishing the two practices bore a rational relationship to a valid state objective. Because this was so, the action denying equal rights to the two schools of medicine implicated no constitutional values. Texas has decided that issue differently. This difference, having been recog-

nized, invests Dr. Stern with an important right to equal treatment with allopathic physicians that cannot be arbitrarily denied by the John Peter Smith Hospital without breaching the fourteenth amendment.

GOLDBERG, Circuit Judge, dissenting:

This is not a happy dissent. While personally I do not condone discrimination against osteopaths, I believe that we are bound by *Hayman v. City of Galveston,* 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714 (1927), and *Berman v. Florida Medical Center,* 600 F.2d 466 (5th Cir.1979), which held that hospitals could discriminate against osteopaths in admitting physicians to their staffs. Because, in my view, *Hayman* and *Berman* represent the current law, they must be applied. Our job as judges, unlike that of doctors, does not include offering second opinions.

In an attempt to bypass *Hayman* and *Berman,* the majority argues that the hospital's bylaws violates Texas law, and that violations of state law by a state entity constitute *per se* violations of federal equal protection. I believe that this represents a novel and unwarranted theory of equal protection. Although, as judges, we cannot offer second opinions, we can offer dissenting opinions. I dissent.

A

An analysis of the hospital's regulation must begin with *Hayman v. City of Galveston,* 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714 (1927). In *Hayman,* the Supreme Court upheld a hospital regulation that excluded osteopathic physicians from the hospital staff on the ground that the hospital's classification was "not arbitrary or unreasonable on its face." *Id.* at 417, 47 S.Ct. at 364. In reaching this result, Justice Stone, writing for the Court, stated:

> We cannot say that a regulation excluding from the conduct of a hospital the devotees of some of the numerous systems or methods of treating diseases authorized to practice in Texas, is unreasonable or arbitrary. In the management of a hospital, . . . some choice in methods of treatment would seem inevitable, and a selection based upon a classification having some basis in the exercise of the judgment of the state board whose action is challenged is not a denial of the equal protection of the laws.

Id. Although *Hayman* was decided before the doctrinal distinction between "strict scrutiny" and "rationality review" was clearly drawn,[1] *Hayman* stands for the dual propositions that (1) osteopathic physicians are not a suspect class, and (2) classifications based upon a physician's medical degree — including whether that degree is osteopathic or allopathic — are rational.

The plaintiffs contend that *Hayman* is no longer good law because of the advances in osteopathic medicine since 1927, when *Hayman* was decided. They argue that while it may have been rational to discriminate against osteopaths in 1927, it is no longer rational to do so. This argument raises difficult jurisprudential questions concerning whether we, as a court of appeals, can pick and choose among Supreme Court precedents on the basis of which ones we think remain legitimate. Fortunately, we need not decide these questions in the present case, since we have recently reiterated the principles underlying

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[1] Although the Supreme court has always implicitly applied different levels of scrutiny to different kinds of legislative classifications, *compare Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911) (environmental regulation) *with Strauder v. West Virginia,* 100 U.S. (10 Otto) 303, 25 L.Ed. 664 (1880) (race), the "two-tier" approach to equal protection first received explicit expression in *United States V. Carolene Prods. Co.,* 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234 (1938).

Hayman in *Berman v. Florida Medical Center,* 600 F.2d 466 (5th Cir. 1979). In *Berman,* we gave a clean bill of health to a hospital regulation precisely like the one in question here, which required applicants for staff appointments to have served in an A.M.A.-approved residency program. *Id.* at 468. As we stated:

> That [the plaintiffs] may have received equivalent training of another sort does not invalidate the hospital's requirement, which is a reasonable one. Doubtless there are midwives in the Fort Lauderdale area quite capable of handling normal childbirths, but this circumstance would scarcely render the requirement of a medical license for practice in this hospital unconstitutional or invalid. Having specified a reasonable means of access to its staff privileges, defendant is not required to shell the woods, canvassing one by one other modes that might or might not be its equivalent.

Id.[2] I believe that we are constrained under both *Hayman* and *Berman* from holding that the hospital's discrimination against osteopaths violates the equal protection clause.

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[2] The plaintiffs argue that *Berman* is not controlling since it was decided on state action grounds and since therefore the statements in *Berman* regarding the rationality of the hospital's regulation are merely dicta. I believe, however, that this represents a misreading of *Berman.* In *Berman,* the court discussed at comparative length the permissibility under the equal protection clause of the hospital's regulation; only in the last paragraph did the court reach the state action question, stating, "Finally, *if more be required,* we concur in the trial court's conclusion . . . that the state statute regarding hospital licensing does not sufficiently implicate Florida in defendant's staff-admission policies to constitute 'state action.' " *Id.* (emphasis added). Since, to me, this seems an odd way to state the *ratio decidendi* of a case, I conclude that *Berman* was decided on equal protection as well as on state action grounds.

B

Implicitly recognizing the force of *Hayman* and *Berman,* the majority attempts to sidestep them by focusing on the Texas statute prohibiting discrimination against osteopaths. The majority does not claim that discrimination against osteopaths itself offends against equal protection — that avenue is foreclosed by *Hayman* and *Berman.* Instead, the majority uses state law to bootstrap a federal equal protection violation.

In my view, this is a novel theory of equal protection, without support in our precedents. Previously, I had thought that a violation of state law was a violation of state law; I had not realized that it could also give rise to a violation of federal equal protection. Although I believe that I have always been a stout and ardent defender of equal protection, I fail to see how state law can provide the basis of a federal equal protection claim.

The equal protection clause embodies a general requirement that equals be treated equally. In itself, this requirement of equal treatment is a purely formal proposition, without any substantive content, since it does not tell us what people are equal.[3] As interpreted over the years, however, the equal protection clause is not a mere formalistic requirement, rather, it imposes certain substantive notions of equality by forbidding government from classifying among people in certain ways[4] — for example, on the basis of race or national origin.

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[3] "Equals or unequals, yes, but equals or unequals in what." Aristotle, *Politics.* Bk. III, § 12, 1282[b] 22; *see also* Benn, *Equality, Moral and Social,* in 3 Encyclopedia of Philosophy 38 (P. Edwards ed. 1967); A. France, *quoted in Aphorisms* 208 (W. Auden & L. Kronenberger eds. 1962) ("The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges.").

[4] *See* Karst, *Foreward: Equal Citizenship Under the Fourteenth Amendment,* 91 Harv.L.Rev. 1, 4 (1977) ("Equality, as an abstraction, may be value-neutral, but the fourteenth amendment is not.");

For purposes of the equal protection clause, people of different races and different national origins are equal; therefore race and national orgin as such cannot be the basis of government classifications.

In *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), the Supreme Court extended the scope of the equal protection clause to include classifications based on administrative as well as legislative action. If government classifies among people in an impermissible way in the execution of its laws, then this violates equal protection just as much as would a similar statutory classification. Contrary to the majority's assertion, however, *Yick Wo* did not change the underlying basis of equal protection analysis: does the state's classification, whether legislative or administrative, violate *federal* norms of equality? In *Yick Wo,* the Supreme Court held that the state's classification did violate federal norms, since it was based on national origin. As the Court stated, "The fact of . . . discrimination [against Chinese people] is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eyes of the law, is not justified." *Id.* at 374, 6 S.Ct. at 1073.[5]

Perry, *Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum.L.Rev. 1023, 1031 (1979)* (the basic principle of equal protection is that "there are some traits and factors — of which race is the paradigmatic example — by virtue of which no person ought to be deemed morally inferior to any other person").

[5] The other cases cited by the majority stand for the same proposition, namely that state administrative as well as legislative action must comply with federal norms of equality. *See Columbus Bd. of Educ. v. Penick,* 443 U.S. 449, 457 n. 5, 99 S.Ct. 2941, 2946 n. 5, 61 L.Ed.2d 666 (1979) (racial segregation); *Robinson v. Florida,* 378 U.S. 153, 156, 84 S.CT. 1693, 1695, 12 L.Ed.2d 771 (1964) (racial discrimination).

The majority enunciates a quite different model of protection analysis. Rather than analyzing whether the state administrative classification violates federal norms of equality, the majority focuses on whether the state administrative classification violates *state* norms of equality. According to the majority, if a state statute classifies certain groups of people as "equal," then federal equal protection mandates that these "equals" be treated equally in the administration of the law.[6] This is a quite different principal from the one enunciated in *Yick Wo.* Indeed, in *Yick Wo,* no violation of state norms of equality was involved: state law permitted the challenged discrimination by giving the state administrative body discretion in granting exemptions from the statute.[7]

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[6] In his concurrence, Chief Judge Clark suggests an alternative theory of equal protection as the ground for the majority's decision. In his view, state law defines not the classes that are deemed to be equal, but rather the rights (including the right to employment) that are entitled to heightened protection under the fundamental rights strand of equal protection analysis. While this theory is cast in different doctrinal terms than the majority's, to me it seems just as novel and unwarranted. The procedural due process cases, as both the majority and the Chief Judge note, have held that state law can define property rights that are entitled to certain procedural protections under the due process clause of the fourteenth amendment. I am unaware, however, of any cases that have held that these state-created property rights give rise to heightened scrutiny under the fundamental rights strand of equal protection analysis. Nor am I sure what form such heightened scrutiny would take. My brother Clark appears to say that, once a state has granted a certain property right, then that right cannot be infringed, regardless of what procedures are used. *See infra* note 7. I agree that this may be true as a matter of state law, but unless we want to constitutionalize much of state law, I fail to see how this is true as a matter of federal equal protection.

[7] The majority not only departs from traditional equal protection analysis by looking to state rather than federal law as the source of its substantive norms of equal protection; it also eschews the

All of the cases cited by the majority in support of its theory, *see* slip op., at 3154 n. 9, 3154 n. 12, at —— n. 9, —— n. 12, either are due process, not equal protection, cases or are concerned with classifications that offend federal, not state, norms of equality. *Kuzinich v. County of Santa Clara,* 689 F.2d 1345 (9th Cir.1982), for example, involved a claim that the state classification infringed on a fundamental federal right, free speech. Indeed, the court specifically stated, "appellant must show that his selection was based on an impermissible ground such as race, religion or his exercise of his first amendment right to free speech." *Id,* at 1349 (quoting *United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir.1975)). Similarly, both *Guillory v. County of Orange,* 731 F.2d 1379 (9th Cir.1984), and *Zeigler v. Jackson*, 638 F.2d 776 (5th Cir. 1981), involved claims that state administrative action lacked any rational basis. *See Guillory,* 731 F.2d at 1383 (plaintiffs claimed that they were treated differently for "no rational reason"); *Zeigler*, 638 F.2d at 779 (state administrative body "failed to offer a rational justification for the differential treatment accorded to [plaintiff]"). All of these cases fit comfortably within traditional equal protection analysis and do not stand for the majority's novel theory.[8]

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traditional standards of review used in equal protection analysis. Rather than applying either strict scrutiny or rationality review to the hospital's regulation, the majority implicitly holds that the hospital's regulation is a *per se* violation of federal equal protection. Thus, the majority paradoxically applies an even stricter standard of review when examining state administration of a state law than it would when examining an alleged racial classification.

[8] The majority also finds precedent for its position in a number of due process cases where courts have looked to state law to define federally-protected rights. In these due process cases, however, state-defined property rights merely triggered federal due process analysis; state law did not define the procedures that were due. Consequently, in these cases, unlike the present one, the federal cause of action was not parasitic on the existence of a state-law

While few cases have squarely addressed the issue, what little authority I have found rejects the principle announced by the majority today. For example, in *Snowden v. Hughes,* 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944), Chief Justice Stone, writing for the Court, stated, "[N]ot every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another." *Id.* at 8, 64 S.Ct. at 401. Chief Justice Stone went on to note that the action of a state board "is subject to constitutional infirmity to the same *but no greater extent* than if the action were taken by the state legislature. *Its legality under the state statute can neither add to nor subtract from its constitutional validity." Id.* at 11, 64 S.Ct. at 402 (emphasis added).

Similarly, in *McDowell v. Texas,* 465 F.2d 1342, *aff'd on rehearing en banc,* 465 F.2d 1349 (5th Cir.1971), *cert. denied,* 410 U.S. 943, 93 S.Ct. 1371, 35 L.Ed.2d 610 (1973), we rejected a claim that a violation of state law by a state board gave rise to a denial of federal substantive due process. *Id.* at 1345-46. What we said there in regard to substantive due process is equally applicable here:[9]

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violation. Indeed, in both of the Supreme Court cases cited by the majority, no violation of state law was involved. *See Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 427-28, 102 S.Ct. 1148, 1153, 71 L.Ed.2d 265 (1982) (state supreme court had ruled that there was no violation of state law); *Board of Regents v. Roth,* 408 U.S. 564, 567, 92 S.Ct. 2701, 2704, 33 L.Ed.2d 548 (1972) (state law left employment decisions to unfettered discretion of university officials). Thus, exercise of federal jurisdiction was neither superfluous nor potentially intrusive on matters of primary interest to the states. Instead, it was necessary to protect federally-defined procedural rights.

[9] Chief Judge Clark attempts to distinguish *McDowell* on the ground that, in *McDowell,* no claim was made that a violation of state law directly gave rise to a violation of the fourteenth amendment. According to Chief Judge Clark, the challenged firing did not itself

Cases of this genre constitute uniquely State causes of action. As such they are peculiarly within the realm of State courts. "A right to have state (or city) laws obeyed is a state, not a federal right." . . . . Even though it is patent that the amorphous and protean contours of substantive due process under the Fourteenth Amendment extend to all citizens in all sorts of conditions and circumstances, it is equally axiomatic that federal jurisdiction under § 1343(3) and 42 U.S.C.A. § 1983 cannot be extended to that purely local squabble by the mere invocation of the generalized protection which these words of the amendment confer.

The Constitution's deeply embedded concepts of federalism demand that we refuse a procedure of statutory construction that would put such a literal gloss on the words of §§ 1343 and 1983 as would kill the spirit the founding fathers

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violate state law, since the plaintiff's continued employment was at the will of the state. Because the plaintiff did not have a state-law property right to continued employment, there clearly was no violation of the fourteenth amendment. A violation of state law was only implicated to the extent that an earlier violation of state law provided the pretext for the firing of the plaintiff by the state. Therefore, according to the Chief Judge, we were not presented in *McDowell* with the question that we face here.

In my view, this represents a considerable gloss on *McDowell.* Although the opinion did not specify what exact violation of state law was involved, it did strongly imply that the plaintiff claimed that his dismissal itself violated state law, not merely that an antecedent state law violation provided the pretext for his dismissal. As the court put the issue in *McDowell,* "[W]as a federal statutory or Constitutional right involved when a State Board fired a State employee *contrary to State law* for local political considerations?" 465 F.2d at 1345 (emphasis added). The court concluded that even though the plaintiff may have had a state-law right to continued employment, this state-law right did not give rise to a federal constitutional right. *Id.* at 1346. "Cases of this genre constitute uniquely State causes of action. As such they are peculiarly within the realm of State courts." *Id.*

> quickened when the people of the sovereign states ceded sufficient governmental power to form a sovereign union . . . . If we were to distort §§ 1343 and 1983 to vest federal courts with jurisdiction over the uniquely local substantive matters which this case presents, we would not only impair our ability to consider the vast array of cases that properly belong in federal forums but, as surely as sunrise, we [would] create yet another and an unnecessary interference with orderly State processes.
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> Only if a false vanity duped us into supposing that the quality of justice in the federal court system is somehow superior to that dispensed by the State, could we justify such an incursion into intrastate affairs. To the contrary, State courts are best equipped to determine the meaning and the scope of State statutes and local policies and to determine whether State officials encroached upon [the plaintiff's] rights of due process which are fully preserved in Texas courts by the Texas and the federal Constitution.

Id. at 1346 (citations omitted).[10]

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[10] The First Circuit reached this same conclusion in *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982). There the plaintiff argued that its due process rights had been violated by the town's distortion of the existing statutory and regulatory subdivision scheme. The First Circuit, in rejecting this claim, stated that if the plaintiff's theory were accepted,

> any hope of maintaining a meaningful separation between federal and state jurisdiction in this and many other areas of law would be jettisoned. Virtually every alleged legal or procedural error [by the state] . . . could be brought to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due process.
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> . . . .

The majority does not discuss the parameters of its principle of equal protection, but its theory appears to have very broad consequences.[11] One potential consequence is that *federal* equal protection must always provide at least as much protection as

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> [T]he conventional planning dispute — at least when not tainted with fundamental procedural irregularity, racial animus, or the like — which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less "distort" the state scheme under which they operate.

Id. at 831, 833. As the court continued, "[The plaintiff] may quite possibly have state law claims on the facts alleged. If so, there appear to be adequate state law remedies to vindicate these claims without resort to a federal court." *Id.* at 833; *see also Simmons v. Jones,* 478 F.2d 321, 328, 329 (5th Cir.1973), *modified on other grounds,* 519 F.2d 52 (5th Cir.1975) (violation of state law does not give rise to violation of federal equal protection "without a showing of systematic exclusion on the basis of race or some other ground forbidden by national policy"; "[s]tripped of its flimsy constitutional trappings [plaintiff's] complaint basically was an effort to enlist a federal court in a campaign to achieve a more faithful application . . . of Georgia's statutory scheme"); *Cloutier v. Town of Epping,* 714 F.2d 1184 (1st Cir.1983) (equal protection as well as due process claim denied); *Crocker v. Hakes,* 616 F.2d 237, 240 (5th Cir.1980) ("mere . . . mistakes of state law do not rise to the level of constitutional violations").

[11] Indeed, to the extent that "classification is the essence of all legislation," *Clements v. Fashing,* 457 U.S. 957, 967, 102 S.Ct. 2836, 2845, 73 L.Ed.2d 508 (1982); *see also* Perry, *supra* note 4, at 1068 ("every time a legislature enacts a law . . . it classifies"), *every* violation of state law is a violation of federal equal protection. For example, if a state improperly denied someone unemployment benefits, then it would be discriminating against him by treating him as a member of the group ineligible for unemployment benefits rather than as a member of the group eligible for such benefits under the state's unemployment compensation scheme.

state equal protection; whenever state equal protection is expanded by a state court decision, federal equal protection (in that state) must follow. For example, if the California Supreme Court held that discrimination against persons over fifty years of age violated California's equal protection clause, then under the majority's theory, discrimination against persons over age fifty (in California) would also become a violation of federal equal protection (despite the Supreme Court's apparent resolution of the federal equal protection issue in *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (state statute setting mandatory retirement age of fifty for policemen does not violate federal equal protection)). According to the rule enunciated by the majority, because California state law would require equal treatment of people under and over fifty, the action of a California state agency that discriminated between groups for whom state law required equal treatment would be a denial of federal equal protection.[12]

While I have little sympathy with efforts to restrict a litigant's access to federal courts where *federal* rights are involved, I believe, in contrast to the majority, that infringements on rights created by state law are best left to state courts.[13] This conclusion is far more compatible than the

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[12] Similarly, the majority's theory would have allowed a simple resolution of many of the legislative reapportionment cases. In *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), for example, the state apportionment plan was admittedly in violation of Alabama's constitution. *Id.* at 540-41 & n. 4, 84 S.Ct. at 1370 & n. 4. Under the majority's view, Alabama's apportionment scheme was a *per se* violation of federal equal protection.

[13] The majority's attempt to derive an equal protection violation from a violation of state law would, doctrinally, be more properly placed within the framework of traditional "rational basis" analysis. To the extent that rational basis analysis involves an inquiry into the state's actual reasons for a classification, rather than merely into

majority's with the principles of federalism that underlie many of our basic constitutional doctrines, including the doctrines that state court determinations of state law are final,[14] and that federal courts should refrain from exercising jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs.[15] The difficulties encountered in the

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conceivable reasons, *see McGinnis v. Royster,* 410 U.S. 263, 270, 93 S.Ct. 1055, 1059, 35 L.Ed.2d 282 (1973) (state classification must rationally further "some legitimate, articulated state purpose"); *Schlesinger v. Ballard,* 419 U.S. 498, 520, 95 S.Ct. 572, 584, 42 L.Ed.2d 610 (1975) (Brennan, J., dissenting), then the rationality of a state classification may depend on state law. *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model of a Newer Equal Protection,* 86 Harv.L.Rev. 1 (1972). In the present case, for example, it could be argued that, by passing the Texas Medical Practices Act, Texas has expressly disavowed any interest in discriminating against osteopaths, and that therefore the hospital's by-law is irrational. On this theory, *Hayman* and *Berman* would be distinguishable, since they did not involve state statutes forbidding discrimination in the admission of physicians to hospital staffs. *See Hayman,* 273 U.S. at 418, 47 S.Ct. at 364; *Berman,* 600 F.2d at 467.

In recent years, however, the Supreme Court and this court have reaffirmed their adherence to the conceivable basis test of rationality. *See, e.g., United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 179, 101 S.Ct. 453, 461, 66 L.Ed.2d 368 (1980); *Town of Ball v. Rapides Parish Police Jury,* 746 F.2d 1049, 1061 (5th Cir.1984). By focusing on conceivable rather than on actual bases for a state classification, the courts have interpreted the rational basis prong of equal protection in terms of a *federal* standard of minimum rationality. Thus, even with rational basis analysis, state law is not the touchstone of validity under the equal protection clause.

[14] *E.g., Mullaney v. Wilbur,* 421 U.S. 684, 691, 95 S.Ct. 1881, 1886, 44 L.Ed.2d 508 (1975); *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590, 632-33, 22 L.Ed. 429 (1874). *See generally* C. Wright, *Federal Courts* 747 (4th ed. 1983).

[15] *E.g., Alabama Pub. Serv. Comm'n v. Southern Ry. Co.,* 341 U.S. 341, 349, 71 S.Ct. 762, 768, 95 L.Ed. 1002 (1951) ("As adequate state

present case of determining whether or not the hospital's regulation does violate state law[16] is a good illustration of why state courts should have primary jurisdiction over enforcing their own laws. Although the majority's theory could be defended in terms of "keeping the states honest,"[17] I believe that

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court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights."); *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) (administration of complicated state regulatory system should be left to state administrative bodies and courts); *Simmons v. Jones*, 478 F.2d 321, 328 (5th Cir.1973), *modified on other grounds*, 519 F.2d 52 (5th Cir.1975) ("As a matter of comity, the district court should have afforded the Georgia courts the opportunity to rectify alleged deviations from the requirements of Georgia law . . . .).

[16] As the majority notes, Texas law forbids only discrimination based "solely" on a physician's medical degree. Thus, if osteopaths were able to attend LCGME-approved residency programs but chose not to, or if some allopaths as well as osteopaths were excluded from admission to the hospital's staff as a result of the hospital's bylaw, then the hospital would not be discriminating among physicians based *solely* on their medical degree. The record concerning both of these points is extremely unclear; it appears that some of the plaintiffs may have had an opportunity to attend allopathic residency programs, *see* Record, vol. 2 at 50, and that allopaths who received their residency training prior to 1970, when the LCGME was established, may not be eligible for appointment to the hospital staff, *see id.*, vol. 3 at 415-6. The plaintiffs did not allege a violation of Texas law in their complaint. As I read the finds of fact below, the district court did not specifically find that Texas law was violated, nor do its findings necessairly imply this conclusion. Although the majority assumes that the hospital's regulation does violate Texas law, I am far from certain that this is the case.

[17] For an analogous argument that the Guarantee Clause, U.S. Const. art. IV, § 4, cl. 1, requires that states follow their own laws, *see* Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 Yale L.J. 561 (1984).

the enforcement of state law is a matter primarily of concern to the states. Ultimately, I believe that the majority's theory trivializes equal protection by shifting attention away from its primary function: imposing substantive restrictions on the ways in which government can govern.

Thus, although I recognize that a malady may lurk within the body politic of Tarrant County, the cure must come from the salving influence of state rather than federal law. I disagree with the majority's equal protection diagnosis and, accordingly, though respectfully, dissent.

Paul A. Stern, et al.

v.

TARRANT COUNTY HOSPITAL DISTRICT, et al.

Civ. A. No. 4-80-281-E.

United States District Court,
N.D. Texas,
Fort Worth, Division.

June 6, 1983.

Osteopathic physicians brought action seeking to enjoin hospital from denying staff privileges on basis of physicians' post-doctoral training. The District Court, Mahon, J., held that the postdoctoral training requirement violated physicians' constitutional rights of the Fifth and Fourteenth Amendments.

Judgment for plaintiffs.

1. Constitutional Law Key 82(6)

A physician has no constitutional right to staff privileges of hospital merely because he is licensed to practice medicine.

2. Constitutional Law Key 238(2)

In physicians' action against hospital alleging equal protection violations arising from hospitals' denial of staff privileges on basis of their postdoctoral training, physicians had not shown a "fundamental right" nor had they shown they were a "suspect class" and, thus, issue was whether their classification bore a rational relation to a legitimate state interest. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

3. Constitutional Law Key 213.1(2)

Rational relation standard of examing equal protection claim requires examination of whether any stated facts reasonably

may be conceived to justify the challenged classification. 42 U.S.C.A. §1983; U.S.C.A. Const. Amend. 14.

4. Hospitals Key 6

Court, in hearing physicians' action seeking to enjoin hospital from denying staff privileges on basis of their postdoctoral training, was to apply law in effect at time it rendered the decision, including statute passed subsequent to events and conditions giving rise to the action.

5. Federal Courts Key 41

Abstention from exercise of federal jurisdiction is the exception, not the rule.

6. Federal Courts Key 55

District court did not find "exceptional circumstances" necessary to justify abstention from hearing physicians' action seeking to enjoin hospital from denying staff privileges on basis of their postdoctural training.

7. Constitutional Law Key 275(1.5)

Hospitals' requirement that physicians, who were duly licensed by the Board of Medical Examiners of Texas and who all had two or more years of postdoctoral training in a program accredited by the American Osteopathic Association, obtain postgraduate medical training as a condition for being granted staff privileges was an arbitrary and false standard in violation of physicians' rights under the Fifth and Fourteenth Amendments. U.S.C.A. Const. Amends. 5, 14.

James A. Williams, Bailey, Williams, Westfall, Lee & Fowler, Dallas, Tex., for plaintiffs.

Frederick M. Schattman, Asst. Dist. Atty., Tarrant County, Fort Worth, Tex., for defendants.

Alan Wilson, Law, Snakard, Brown & Gambill, Fort Worth, Tex., for George J. Luibel.

MEMORANDUM OPINION AND ORDER

MAHON, District Judge.

Plaintiffs Paul A. Stern, Lee J. Walker, C. Raymond Olson, Joel Alter and W. R. Jenkins bring this action against Defendants Tarrant County Hospital District, John Peter Smith Hospital, Harold B. Daley, Bruce K. Jacobson, George J. Luibel, Robert L. McAfee, George H. Moore, Harry A. Noah, Tim Philpot, James C. Pollard, and Julius Truelson, alleging that the denial of Plaintiffs' applications for staff membership at John Peter Smith Hospital has denied to these plaintiffs their rights and privileges under the Fifth and Fourteenth Amendments to the Constitution of the United States pursuant to 42 U.S.C. § 1983, and has violated the antitrust laws found in the Sherman and Clayton Acts. 15 U.S.C. §§ 1-7, and 15 U.S.C. §§ 12-27. Trial was to the Court without a jury. Having carefully considered the evidence presented, the argument of counsel and the supporting briefs, the Court enters the following opinion which will address: (1) Plaintiffs' Constitutional Rights, (2) Applicable Standard, (3) Case Law Background, (4) Abstention, (5) Texas Medical Practice Act, (6) Reasonableness, (7) Findings of Fact, and (8) Conclusions of Law.

I.

Plaintiffs' Constitutional Rights

[1] All of the plaintiffs are physicians duly licensed by the Board of Medical Examiners of the State of Texas and all have had two or more years of post-doctoral training in a program

accredited by the American Osteopathic Association. Defendants correctly assert that in order to sustain a suit under 42 U.S.C. § 1983, a plaintiff must show the Court some right, privilege, or immunity that he claims under the Constitution. Defendants are also correct in stating that a physician has no constitutional right to the staff privileges of a hospital merely because he is licensed to practice medicine. *Hayman v. City of Galveston, et al.*, 273 U.S. 414, 416-17, 47 S.Ct. 363, 364, 71 L.Ed. 714 (1927); *Daly v. Sprague*, 675 F.2d 716, 727 (5th Cir. 1982); *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173, 175 (5th Cir. 1971).

However, that does not end the Court's inquiry. The Fourteenth Amendment contains an "equal protection" clause that applies to any "state action" regardless of whether the state action affects specific rights which themselves rise to a constitutional level. For example, in *Meredith v. Allen County War Memorial Hospital Com'n*, 397 F.2d 33 (6th Cir.1968), involving the denial of reappointment of a physician to the hospital medical staff, the Court stated:

> Defendants are correct in asserting that plaintiff has no constitutional right to practice his profession at a public facility . . . The constitutional requirements of due process and equal protection, however, place limitations on the manner in which one can be excluded from such practice.

Meredith at 35.

Likewise, in a case brought by Chiropractors, the Fifth Circuit noted:

> We are not called on at this time to say whether chiropractors should be admitted to practice in Louisiana, but the question is whether they are entitled to an opportunity to prove that the State's denial of their claimed right to practice an allegedly useful profession is so arbitrary and unreasonable as to amount to a denial of due process or of

> the equal protection of the laws under the Fourteenth Amendment.

England v. Louisiana State Board of Medical Examiners, 259 F.2d 626, 627 (5th Cir. 1958).

Similarly, in *Foster v. Mobile County Hospital Board*, 398 F.2d 227 (5th Cir. 1968), the Fifth Circuit considered the denial of admission of plaintiffs to the medical staff of the county hospital and noted:

> It is not disputed by appellees that the Mobile County Hospital Board, which was created by Act No. 46 of the Alabama Legislature, and which receives both state and federal funds, is a public institution. Its acts, therefore, are state acts subject to the provisions of the Fourteenth Amendment . . . .
>
> That such state action demands equal treatment of members of the same class (i.e. physicians) is a fundamental requisite of equal protection rights.

Foster at 230.

There are numerous cases in which the absence of a constitutional right to practice medicine in a public hospital has not prevented the courts from considering the physician's equal protection claims. Plaintiffs in this case have presented a similar equal protection claim which this Court will consider.

II.

Applicable Standard

In its consideration of Plaintiff's equal protection claims, the Court must determine the appropriate standard to apply. The Fifth Circuit has stated:

> The proper degree of judicial "scrutiny," . . . is a function of two variables: first the nature of the right affected; and

> second, the identity of the plaintiff. If the classification "interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class," . . . "strict" judicial scrutiny is then the standard of review . . . Otherwise, the question is whether the classification bears "a rational relation to a legitimate state interest."

Pappanastos v. Board of Trustess, Etc., 615 F.2d 219, 220-21 (5th Cir. 1980).

[2] Plaintiffs have not shown a "fundamental right" nor have they shown they are a "suspect class," and, thus, the Court will use the "rational relation" standard to judge the classification in this case.

[3] The rational relation standard requires an examination of whether "any state of facts reasonably may be conceived to justify" the challenged classification. *McGowan v. Maryland,* 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961). The Fifth Circuit, in *Foster,* after noting that the actions of a county hospital board are state actions demanding equal treatment of all members of the same class (of physicians) explained that "[a]ny distinction between such members must be on a reasonable basis" and "the distinctions which are drawn must in some way relate to the pupose of the classification made." *Foster* at 230.

These are the guidelines the Court will follow in this case.

III.

Case Law Background

An examination of the case law regarding osteopaths and their admission to practice in public and private hospitals must begin with *Hayman v. City of Galveston,* 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714 (1927) in which an osteopathic physician who was a resident of Texas brought suit to enjoin the enforce-

ment of a regulation excluding osteopaths from practicing in a municipal hospital. The Supreme Court first held that a physician does not have a constitutional right to practice his profession in a hospital maintained by a state or a political subdivision (as already noted above). *Hayman* at 416-17, 47 S.Ct. at 364.

Next, the Supreme Court noted that there were "numerous systems or methods of treating diseases authorized to practice in Texas" and that in the management of a hospital, a choice among those methods of treatment would be inevitable. *Hayman* at 417, 47 S.Ct. at 364. The choice of excluding osteopaths was found to have a "basis in the exercise of the judgment of the state board," and thus, the Supreme Court stated it could not say that the regulation was either unreasonable or arbitrary. *Hayman* at 418, 47 S.Ct. at 364. Finally, the Supreme Court said that the provision of the Texas Constitution declaring that "no preference shall ever be given by law to any schools of medicine," Art. XVI, § 31, Texas Constitution, applied only to the admission to practice medicine in Texas and had nothing to do with the qualifications of those who were to be allowed to practice in state hospitals. *Hayman* at 417, 47 S.Ct. at 364.

At first glance, this case decided in 1927, would appear to definitely resolve all of the issues which are now before the Court over 50 years later. This Court, however, must always be mindful of the basic premise that our system of law is an *evolving* one, uniquely adaptable to the constantly evolving society and changing world in which we live. Therefore, the Court is compelled to examine all of the evidence presented in this case to determine if such a standard is unreasonable or arbitrary under the facts as they exist today, even though such a standard may have been reasonable under the facts as they existed over 50 years ago.

This Court, in its examination of the evidence has concluded that at least two basic changes regarding the practice of osteopathic medicine in Texas have taken place since *Hayman* was decided in 1927. First, the evidence before the Court shows that the obvious differences which once distinguished osteopathic physicians (D.O.'s) from allopathic physicians (M.D.'s) have virtually disappeared today.

It is undisputed that today there is no substantial difference between accredited medical schools conferring "Doctor of Medicine" degrees and "Doctor of Osteopathy" degrees except that students attending the medical school conferring the "Doctor of Osteopathy" degree are required to take several courses in manipulative therapy. The only remaining difference between D.O.'s and M.D.'s has been described simply as one of philosophy.

Second, the Texas Medical Practice Act, Tex.Rev.Civ.Stat. art. 4495b (Vernon Supp. 1982-83) [hereinafter called "the Act"] was passed by the Texas Legislature in 1981. This Act states, among other things, that "state agencies or political subdivisions shall not differentiate solely on the basis of the academic medical degree held by a person licensed under this Act." Subchapter A, Sec. 1.02(9) (Vernon Supp. 1982-83). Such an act passed by the legislature would, at the least, require a reconsideration by the Court of the "reasonableness" of actions by a public hospital differentiating betweeen osteopathic and allopathic physicians, even though such actions have been held to be "reasonable" in cases considered *before* the Act was passed. *See e.g., Berman v. Florida Medical Center, Inc.*, 600 F.2d 466 (5th Cir. 1979).[1]

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[1] The Court notes that the *Berman* case involved a private hospital, and was dismissed on the pleadings for want of state action. Any other statements in the opinion regarding reasonableness of the osteopathic/allopathic distinction are dicta.

[4] Defendants assert, however, that this lawsuit, filed in 1980, involves only events and conditions existing in 1979, and that none of these actions should be judged by an act passed in 1981. The Court does not agree. This suit was brought seeking only an injunction and does not request any relief in the form of damages for actions that have taken place in the past. Also, as the Supreme Court stated in *Bradley v. Richmond School District,* 416 U.S. 696, 717, 94 S.Ct. 2006, 2019, 40 L.Ed.2d 476 (1974): "A court is to apply the law in effect at the time it renders the decision, unless doing so would result in manifest injustice or there is statutory or legislative history to the contrary."

In determining whether an injunction should issue, the Court must examine the evidence presented to it during the trial concerning the law and facts as they presently exist. For example, if an injunction were sought and the reason for such injunction disappeared before the time of trial, the Court should not limit its inquiry to the law and facts which existed prior to the filing of the suit, but should consider the then-existing circumstances to make its decision, properly denying the injunction. Likewise, if, in the present case, the law has changed since the filing of the suit, and if such change, in addition to other evidence before the Court, would lead to the conclusion that an injunction should issue, the Court sees no reason to limit its consideration to the law and facts of 1979.

IV.

Abstention

Next, Defendants cite the abstention doctrine of *Railroad Commission v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). In that case a regulation issued by the Texas Railroad Commission was being attacked as unconstitutional and the Commission asserted its power under a Texas statute to issue such a regulation. There, the Supreme Court held that

the district court should have abstained from hearing the case until the state courts had construed that state statute as to whether it sustained the Commission's assertion of power. The Court noted that one possible construction of the state statute would have avoided both the need for a constitutional decision and the "needless friction with state policies." *Pullman* at 500, 61 S.Ct. at 645.

In contrast, Defendants in this case are not asserting their power to make such a provision as the one in question on the basis of some state statute which has yet to be construed by state courts. There is no challenge to the constitutionality of any state statute and the Judgment to be entered in this case does not present even the possibility of ruling on the constitutionality or unconstitutionality of any state statute.[2]

Furthermore, the *Pullman*-type abstention requires that "(1) there be an unsettled issue of state law; *and* (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised." [the Court's emphasis] *Palmer v. Jackson,* 617 F.2d 424, 428 (5th Cir.1980); *Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020, 1034 (5th Cir.1981), *cert. denied sub nom., Theaters West, Inc. et al. v. Holmes, et al.,* 455 U.S. 913, 102 S.Ct. 1264, 71 L.Ed.2d 453 (1982); *See generally:* C. Wright, A. Miller, & E. Cooper, Federal Practice and Proce-

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[2] The other types of abstention have not been asserted and this Court finds no need to apply them. There are no "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case ... at bar," *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976), and thus *Burford*-type abstention is not required. *See Burford v. Sun Oil,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). Also, there are no pending state criminal proceedings and thus *Younger* abstention is not appropriate. *See Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

dure § 4242 (1978). The first prerequisite of an "unsettled issue" of state law is not found in the present case, where the state statute involved is "clear and unambiguous in all material respects." *Harmon v. Forssenius,* 380 U.S. 528, 535, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965). *See also Scheinberg v. Smith,* 659 F.2d 476, 480-481 (5th Cir. 1981); *Duncan v. Polythress,* 657 F.2d 691, 696 (5th Cir.1981); *High Ol' Times, Inc. v. Busbee,* 621 F.2d 135, 139-141 (5th Cir.1980).

In the present case, the pertinent part of the state statute says that the separate laws regulating the practice of medicine should be brought together under one act and goes on to state:

> [R]ecognizing that state agencies and political subdivisions which own or operate hospitals, facilities, or institutions or administer programs are responsible for determining medical staff appointments or the qualifications of physicians for such programs, and further recognizing that all persons licensed under the Act have met certain basic educational requirements, been examined by the board, and passed the same qualifying examination which applies the same standards to all who desire to practice medicine, irrespective of academic medical degree, it is the intent of the legislature to prohibit differentiation solely on the basis of the academic medical degree held by a person licensed under this Act in determining such medical staff appointments or such qualifications. To this end such state agencies or political subdivisions shall not differentiate solely on the basis of the academic medical degree held by a person licensed under this Act. State agencies or political subdivisions which own or operate hospitals, facilities, or institutions shall, however, be free to adopt reasonable rules, regulations, and requirements relating to qualifications for medical staff appointments, reappointments, termination of appointments, the delineation of clinical privileges, or the curtailment of clinical privileges of those who are appointed

> to such medical staff or permitted to participate in educational programs so long as such rules, regulations, and requirements are determined upon a reasonable basis, such as professional and ethical qualifications of the physician, upon standards that are reasonable, applied untainted by irrelevant considerations, supported by sufficient evidence, free of arbitrariness, capriciousness, or unreasonableness and which do not differentiate solely upon the academic medical degree held by such physician. The provisions contained herein relating to the academic medical degree shall not be applicable to any medical school or college or any programs of a medical school or college.

Tex.Rev.Civ.Stat.art.4495b, Subchapter A, Sec. 1.02(9) (Vernon Supp.1982-83).

The Court finds this language "clear and unambigious in all material respects." *Harmon, supra,* 380 U.S. at 535, 85 S.Ct. at 1182. It clearly applies to the Tarrant County Hospital District and it clearly prohibits differentiation solely on the basis of academic medical degree held by a person. The constitutionality of this statute is not involved, and the Court is looking to this statute only as a guide in determining the alleged reasonableness of the provision at issue in the by-laws of the medical/dental staff of the county hospital.

[5.6] Having found the law is clear and unambiguous, the Court need not examine the second prerequisite for *Pullman* abstention since *both* prerequisites must be present before abstention is required. In conclusion, the Court stresses that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation District, et al. v. United States,* 424 U.S. 800, 813, 96 S.CT. 1236, 1244, 47 L.Ed.2d 483 (1976). *See also Zwickler v. Koota,* 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); *O'Hair v. White,* 675 F.2d 680, 692 (5th Cir.1982); *High Ol' Times, supra.* This Court does not find those " exceptional circumstances" *Id.*

which must be present to justify abstention. Thus, the Court concludes the abstention doctrine of *Railroad Commission of Texas v. Pullman Co.* is not applicable to this case.

V.

Texas Medical Practice Act

The Texas Medical Practice Act of 1981, (the "Act") recognizes that "all persons licensed under this Act have met certain basic educational requirements, been examined by the board, and passed the same qualifying examination which applies the same standards to all who desire to practice medicine, irrespective of academic medical degree." Tex.Rev.Civ.Stat. art. 4459b, Subchapter A, Sec. 1.02(9) (Vernon Supp.1982-83). More specifically, Subchapter C of the Act lists the following qualifications for licensure:

> (a) An applicant, to be eligible for the examination, must present satisfactory proof to the board that the applicant:
>
> (1) is at least 21 years of age;
>
> (2) is of good professional character;
>
> (3) has completed 60 semester hours of college courses other than in medical school, which courses would be acceptable, at the time of completion, to The Unviersity of Texas for credit on a bachelor of arts degree or a bachelor of science degree; and
>
> (4) is a graduate of a medical school or college that was approved by the board at the time the degree was conferred.
>
> (b) Applications for examination must be made in writing, verified by affidavit, filed with the board on forms prescribed by the board, and accompanied by a fee as the board determines to be reasonable.

Tex.Rev.Civ.Stat. art. 4995b, Subchapter C, Sec. 3.04(a), (b) (Vernon Supp.1982-83).

The Texas Legislature gave the State Board of Medical Examiners the following power in licensing: "In addition to the requirements prescribed by this Act, the board may require applicants to comply with other requirements that the board considers appropriate and establish reasonable fees for examination." Tex.Rev.Civ.Stat.art.4495b, Subchapter C, Sec. 3.05(b).

The Board subsequently exercised its power under that provision. As a result, the Licensure Rules of the Texas State Board of Medical Examiners, as published in the *Texas Register,* vol. 6, No. 81, October 27, 1981,[3] list six criteria for licensure qualifications.

In addition to age, "good professional character," 60 semester hours of college courses other than medical school, graduation from an approved medical school, passing a medical examination and the Texas medical jurisprudence examination, the Board requires completion of a one-year program of graduate medical training approved by the Board. Title 22 Examining Boards, Part IX. Texas State Board of Medical Examiners, Chapter 163, Licensure by Examination, § 163.1(a) Licensure Qualifications for All Applicants, vol. 6, no. 81, Oct. 27, 1981.[4]

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[3] The Court takes judicial notice of these Rules pursuant to Art. 6252-13a § 4(c) Tex. Rev. Civ. Stat. (Vernon Supp.1982-83).

[4] The Court notes that House Bill No. 1999 amends the Texas Medical Practice Act to add the following subsection (5) to Chapter C regarding qualifications for licensure in Texas:

(5) has successfully completed a one year program of graduate medical training approved by the board. In addition to other licensure requirements, the board may require by rule and regulation that graduates of medical schools located outside the United States and Canada comply with other requirements that the board considers appropriate, including but not limited to additional grad-

In § 163.2 the "approved medical schools" are described as those accredited by *either* the Liaison Committee on Medical Education *or* the American Osteopathic Association. Similarly, in § 163.4 the Board states it will approve training programs which have been accredited by *either* the Liaison Committee on Graduate Medical Education *or* the American Osteopathic Association (or two other committees). Evidence was presented during the trial of this case to explain the fact that the Liaison Committee on Graduate Medical Education, although it is not an arm of the American Medical Association, accredits only allopathic medical programs (and has from the day of its inception).

The Act, in recognizing that all persons who have been licensed under the Act have met a threshold of requirements (that "threshold" being the six requirements of § 163.1 discussed above), states the intent of the Legislature to prohibit differentiation solely on the basis of academic medical degree. These threshold requirements accept both allopathic and osteopathic degrees and training. The Court chooses to refer to the six requirements listed in § 163.1 as "threshold" requirements because beyond this "threshold" of requirements there are, of course, further reasonable requirements for additional professional and ethical qualifications for any physician who desires to be appointed to the medical staff of a public hospital.

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uate medical training in the United States, except those who qualify for licensure in Section 5.04 of this Act. However, the applicant shall be eligible for examination prior to complying with Subdivision (5) of Subsection (a) of this section but shall not be eligible for the issuance of an unrestricted license until the requirements of this subsection have been satisfied.

During the Sixty-eighth Legislature, House Bill No. 1999 passed the House on April 29, 1983, and passed the Senate on May 29, 1983, and is now pending the signature of Texas Governor Mark White.

Obviously, the fact that a person has met these "threshold" requirements for licensing does not mean that he should automatically be appointed to the staff of a public hospital, and the Court recognizes and approves a requirement of additional standards for appointment. However, in considering staff apointments to public hospitals, there is no apparent reason to re-examine the elements of the "threshold" qualifications that every physician licensed in Texas must meet, and to differentiate between osteopaths and allopaths solely because of the degree they hold or the training they received since both of the types of degrees and training are unquestionably acceptable in the "threshold" requirements for licensure in Texas.

The Texas legislature clearly expressed its intent in this matter in the following sentence:

> State agencies or political subdivisions which own or operate hospitals, facilities, or institutions shall, however, be free to adopt reasonable rules, regulations, and requirements relating to qualifications for medical staff appointments, reappointments, termination of appointments, the delineation of clinical privileges of those who are appointed to such medical staff or permitted to participate in educational programs so long as such rules, regulations, and requirements are determined upon a reasonable basis, such as professional and ethical qualifications of the physician, upon standards that are reasonable, applied untainted by irrelevant considerations, supported by sufficient evidence, free of arbitrariness, arbitrariness, or unreasonableness and which do not differentiate solely upon the academic medical degree held by such physician.

Tex.Rev.Civ.Stat. art. 4495b, Subchapter A, Sec. 1.02(9) (1982).

The Court now turns to the question of whether the provision in Article 3, § 3.11 of the by-laws of the Medical/Dental Staff

of John Peter Smith Hospital (Joint Exhibit 11) is, in fact, a reasonable one.

VI.

Reasonableness

In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981) Justice Brennan spoke for a majority of the Court in considering an equal protection challenge to a state statute:

> But States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' *Vance v. Bradley,* 440 U.S. 93 [99 S.Ct. 939, 59 L.Ed.2d 171], legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational . . . they cannot prevail so long as 'it is evidence from all the consideration presented to [the legislature] and those of which we may take judicial notice that the question is at least debatable' [cites omitted].

Clover Leaf, 449 U.S. at 464, 101 S.Ct. at 724.

Also, in contrast to *Clover Leaf,* Plaintiffs have challenged the *theoretical* basis for Defendants' provision. See *Clover Leaf* at 463, 101 S.Ct. at 723. While the Court will not substitute its own judgment for those who enacted the bylaws in question it will examine the reasons given by Defendants for those provisions in light of the Texas Medical Practice Act of 1981. [5]

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[5] As discussed above, this suit was filed in 1980, prior to the enactment of the Medical Practice Act of 1981. The bylaws of John Peter Smith Hospital, however, have been amended since the enactment of that Act, and still require training in a program

[7] The Court will first examine the background of the provision in question. The earliest staff bylaws of John Peter Smith Hospital before the Court (Joint Exhibit 1) show that in 1960, one requirement for staff membership was membership in the Tarrant County Medical Society, an allopathic institution. In 1974, that was changed to a requirement of a degree of Doctor of Medicine (allopathic) from a school accredited by the Council on Medical Education of the American Medical Association and "one year of internship approved by the Council on Medical Education of the American Medical Association" (Joint Exhibit #3, page 2, Art. III, § 3.11). The M.D. (allopathic) requirement was continued in December 1974 (Joint Exhibit #4), 1975 (Joint Exhibit #5), 1977 (Joint Exhibit #6), and 1978 (Joint Exhibit #7).

In 1979, (Joint Exhibit #8) the M.D. requirement was changed to a requirement of two years of training in a program accredited by the Liaison Committee on Graduate Medicine Education (LCGME), which accredits only allopathic training programs. The only change in that requirement in December 1980 was a reduction from two years to one year of training (in the LCGME accredited program). The record does not reveal why this was changed from two years to one year. Then, in December 1981, the accrediting body was changed from the LCGME to the "Accreditation Committee on Graduate Medical Education," a successor to the LCGME.

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approved by the "Accreditation Committee on Graduate Medical Education," the successor of the LCGME discussed above (See Joint Exhibit #11). Had the bylaws which were amended in December of 1981 been changed to drop this requirement, the request for an injunction would be moot at this time. On the other hand, the Defendants, by not changing the requirement, and by claiming such requirement is reasonable even in light of the Medical Practice Act of 1981 place the issue of reasonableness before the Court today.

In the bylaws of 1979 (Joint Exhibit #8) there was a "waiver" of the above qualifications, in "exceptional cases." It was under this waiver that Dr. Paul Stern, one of the Plaintiff osteopaths, had applied for staff membership and privileges, and the Executive Committee did, in fact, recommend waiving that requirement for Dr. Stern on August 7, 1979. However, before the matter was presented to the Board of Managers for the Tarrant County Hospital District, Dr. Bruce Jacobson (who admitted to this Court that he wishes to keep the Hospital an allopathic institution) contacted the then Assistant Tarrant County District Attorney, Marvin Collins, who was the Board's legal advisor, and raised the question of what guidelines were to be applied in the "exceptional cases."

Mr. Collins, the legal advisor, recommended that the approval of Dr. Stern be deferred pending receipt of the staff's recommendations concerning the guidelines. The Board of Managers determined that no appropriate guidelines could be established and thus eliminated the "waiver" for exceptional cases. Dr. Stern was denied staff privileges and all other Plaintiff osteopaths were likewise denied staff privileges in 1979. Subsequently, the bylaws were amended in 1980 to eliminate any possible "waivers" under any circumstances. All parties before the Court agree the denial of staff membership for all Plaintiffs was based solely on their lack of training in an LCGME-accredited program.

Defendants first assert that such a requirement relates to the post-graduate medical training program of physicians, not to their "academic medical degree" and thus, does not differentiate solely on the basis of the academic medical degree held by a person licensed under this Act" Vernon's Ann.Civ.St. Art. 4495b, *supra*. However, it is obvious that if the Board of Managers were to state in the bylaws that the Board, itself, rather than the LCGME would be the body who must approve certain training programs, then in light of the Medical Practice

Act of 1981 the Board would not be free to state that it would personally investigate and approve only allopathic training programs providing training for physicians the majority of whom hold allopathic degrees and would not even investigate osteopathic training programs where the overwhelming majority of physicians with osteopathic degrees train.

And yet, rather than make such a statement on its own part, the Board chose to delegate such investigation and accreditation of training programs to the LCGME, who, according to the undisputed evidence in this Court, takes just such a position as described above. The Defendants appear to be attempting in this delegation to do indirectly what they cannot, in light of the Act, do directly. The Court finds this to be unreasonable.[6]

Next, Defendants assert that even if such approval of graduate training programs is differentiation on the basis of academic medical degree, it is not *solely* on such a basis, but is also based on the reasonable desire on the part of the Board that only the physicians of the highest quality be on the staff. Noting that the burden is on the Plaintiffs to convince the Court that the reason given by Defendants "could not reasonably be conceived to be true by the . . . decisionmaker," *Clover Leaf* at 464, 101 S.Ct. at 724, the Court finds that Plaintiffs have carried their burden of proof in this case for the following reasons.

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[6] Plaintiffs assert that delegating the determination of qualifications for staff membership from the Board to the LCGME is improper under *Duson v. Poage,*318 S.W.2d 89 (Tex.Civ.App.1958 w/r n.r.e.). Without deciding that issue, the Court emphasizes that even if such delegation were proper, in the present case it would result in a party doing indirectly what he must not do directly under the law. On the other hand, if such delegation is improper, the new words added to the bylaws in 1979, and in the 1980 and 1981 bylaws stating that the standards of the accrediting body LCGME are specifically "adopted" does not cure the delegation problem.

The Court is aware that concern about the high quality of physicians in John Peter Smith Hospital is a basic principle in all actions taken by that hospital. However, the history of the bylaws of the Tarrant County Hospital District and the testimony before the Court reveals that in the years since 1960 the bylaws have repeatedly been amended to meet the changing legal standards regarding osteopaths and allopaths, and at the same time, to continue to have the ultimate effect of excluding all osteopathic physicians. Thus, the Court has seen a continuous pattern, the actual purpose of which is to exclude *all* osteopathic doctors from the hospital either by requiring that they be M.D.'s or by later requiring that their post-doctoral training be allopathic. It appears that such provisions were aimed not at maintaining a highly-qualified staff, but at maintaining a segregated allopathic hospital.[7]

Second, the Court notes that even if such a concern about the qualifications of the staff is the true reason for the provisions in question, that reason has been shown by Plaintiffs to be arbitrary and capricious. Defendants' assertions that they are primarily concerned with seeing that only the physicians of highest quality are on the staff and that they must therefore carefully make such rules and regulations as are before the Court today, are weakened by several facts which they have neither denied nor contradicted. First, as the Court has discussed above, the "threshold" requirements for Licensure in Texas approve of both allopathic and osteopathic post-graduate medical training. The Medical Practice Act, while recognizing that certain *additional* factors (namely "professional and ethical qualifications" of the physician) may be considered in

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[7] For example, Dr. Hargrove testified that a position taken in 1976 involved keeping all osteopaths off of the staff. A fall-back position was to allow D.O.'s but make them allopathic. He admitted this fall-back position was assumed in 1979. No words about the quality or ability of the staff were involved.

appointment to staffs of public hospitals, does not include the reexamination of those "threshold" requirements as a factor, implying that those who have met the threshold requirements are equally qualified in those areas. Thus, a concern about the quality of physicians would be unreasonable according to the Medical Practice Act, if it measured such quality by differentiating solely between allopathic and osteopathic education.

Here, the Board of Managers asserts its desire to reexamine those threshold requirements, for no apparent reason. Dr. Jacobson testifying for the Defendants admitted that he did not consider osteopathic training to be "inferior" to allopathic training. Such a statement cannot logically support the theory that a desire for the highest qualified physicians may be effected by looking only to allopathic training programs, expecially in light of the Act in which a distinction between osteopaths and allopaths is unreasonable by definition.

Also, the Defendants' insistence that only those physicians who attended LCGME-approved graduate training programs have the necessary training and skills to meet the hospital's high qualifications is contradicted by the fact there are numerous physicians on the staff of John Peter Smith Hospital who attended training programs which were not approved by LCGME. LCGME came into existence in 1970, and all graduate training programs before that year fall short of this requirement. However, to avoid this small problem whenever a physician on the staff is being considered for reappointment, the bylaws were rewritten in 1980 and 1981 to read "Qualifications for *Initial* Appointment" [the Court's emphasis]. Thus an automatic waiver was written into the requirements for all allopathic physicians already on the staff in the absence of LCGME-approved training. In contrast, those osteopaths who received training before 1970 face the absolute impossibility of having attended any training program in the world that was LCGME-approved before 1970.

More importantly, in the testimony of Dr. Roberts, from Southwestern Medical School, speaking as an allopathic physician, he denied that experience at an LCGME-approved training program would mean an applicant was a good physician. He elaborated on that denial by stating that some LCGME-approved training programs are placed on probation for four to seven years. Thus some M.D.'s go through their entire residency in a deficient program, but their training looks as good on paper as any other LCGME-approved training.

A third theory offered by Defendants as a basis for the provision in question is that all physicians on the staff are "potential teachers" in the post-graduate program and Defendants have a reasonable desire that all physicians on the teaching staff at John Peter Smith Hospital should be trained in allopathic programs. In asserting this theory, Defendants apparently use a three-step process. They begin with the premise that a physician who meets the qualifications may be appointed to the hospital staff. Next, Defendants add the statement that all physicians appointed to the hospital staff are potential teachers in the post-graduate program. Finally, Defendants arrive at the conclusion that if an osteopath is appointed to the hospital staff that is the equivalent of having an osteopath on the teaching staff of the allopathic educational program. The Court considers such a conclusion a *non sequitur*. It is not supported either by the evidence before the Court or by any logical reasoning.

Defendants have explained that whenever a physician is on the hospital staff and has patients at John Peter Smith Hospital, the educational training program could potentially include his patients. Article IV, Sec. 4.8 of the bylaws of John Peter Smith Hospital states: "All categories of the Staff shall participate in the education programs of the House Staff [made up of interns, residents, and fellows] on request of the President of the Staff." Joint Exhibits 6-11. The Court notes that there is

nothing "automatic" about this regulation. Only in the event that the President of the Staff takes the affirmative step of asking an osteopathic physician on the staff to participate in the education program would that potential happening actually occur. Thus the bylaws of John Peter Smith Hospital (which may be changed by Defendants at anytime) leave the decision of who will be asked to participate in education programs solely in the discretion of the President of the Staff.

Additionally, the "district sponsored patients" (those whose care is underwritten in whole or in part by the Tarrant County Hospital District) are under the sole control of the teaching staff. Thus, the argument has been presented that whenever an osteopath on the staff has a "district sponsored patient," then that patient would automatically be a patient in the education program, and that patient would somehow bring the osteopathic physician into the education program, too. The Court does not agree since the "district sponsored patient" would, according to the regulations, merely be assigned to one of the physicians on the teaching staff. *See* "Rules and Regulations of Tarrant County Hospital District Medical and Dental Staff," page 58, no. 3, Joint Exhibit #11.

Under the same penumbra of concern about osteopaths on the hospital staff being the equivalent of osteopaths on the allopathic teaching staff, the Defendants also assert concern over losing accreditation as a graduate training program or affiliation with the University of Texas Southwestern Medical School if they appoint osteopaths to their staff. In direct conflict with that expressed concern, Defendants admit there are now four osteopathic physicians on the staff at John Peter Smith Hospital.[8] They each attended post-doctoral military service hospitals approved by the LCGME. According to De-

[8] Additionally, Dr. Hargrove testified that osteopaths do practice at other hospitals approved by the (allopathic) Joint Commission on Accreditation of Hospitals.

fendant's theory, every osteopathic physician on the staff is the equivalent of an osteopathic teacher in its teaching program and thus, there are already four potential osteopathic teachers on the staff of John Peter Smith Hospital.

However, the question of losing accreditation or affiliation has never arisen with regard to those four osteopathic physicians now on the staff.[9] If the possibility of an osteopath on the staff becoming a teacher were a reasonable concern, the actions of Defendants toward the four osteopaths now on staff do not bear out that fact. The evidence before the Court simply does not support that theory.

The Court's disagreement that admission to the hospital staff would affect the affiliation with Southwestern Medical School is further strengthened by the following testimony of Mr. Philpot:

> Mr. Philpot: There is a difference between medical staff application and having an affiliation for medical training. Obviously, the entrance of osteopathic physicians onto the medical staff does not directly affect the affiliation agreement. I mean, we have —
>
> The Court: That's what I was having problems —
>
> Mr. Philpot: We have four osteopathic physicians on the staff now, and it has absolutely no impact at all on that affiliation agreement.

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[9] The Court notes that according to the testimony of Mr. Philpot, the hospital administrator, the LCGME evaluates "the interactions between the medical staff and the hospital, per se, to determine if there is an effective environment in which to train resident physicians." Apparently the presence of four osteopathic physicians on the staff has not harmed that "effective environment," since John Peter Smith still has LCGME/ACGME accreditation.

> You see, I categorize those two elements as separate and distinct issues altogether. I mean, a hospital can have both doctors of medicine and doctors of osteopathy. Most places I have been have. Peter Smith does, too.

Thus, the Court concludes that the third theory offered by Defendants for the requirement of post-graduate medical training in an LCGME/ACGME-approved program has been proven by Plaintiffs to be unreasonable. The Court strongly emphasizes that none of the Plaintiffs applied for the teaching staff at John Peter Smith Hospital. Thus, the Court finds that the issue of osteopaths being on the allopathic teaching staff is before the Court only because it was raised as a defense by Defendants. The Court has addressed that issue only insofar as to say that admitting osteopaths to the staff will not affect the teaching staff at John Peter Smith Hospital. The Court recognizes the two independent schools of medicine and the Texas legislature apparently does, too. It expressly addressed the question of differentiating between allopaths and osteopaths for a particular teaching staff in the following language:

> The provisions contained herein relating to the academic medical degree shall not be applicable to any medical school or college or any programs of medical school or college.

Tex.Rev.Civ.Stat. art. 4495b, Subchapter A, Sec. 1.02(9) (1982).

Therefore, it is obvious that this Court could not, even if it desired to (which it does not), require allopathic educational programs to include osteopathic teachers. Likewise, it could not require osteopathic educational programs to include allopathic teachers.

In conclusion, the Court finds that all of the reasons offered by Defendants for the requirement of post-graduate medcial training in an LCGME/ACGME-approved program are unreasonable, and that such a requirement is a violation of Plaintiffs'

constitutional rights under the Fifth and Fourteenth Amendments.

VII.

Findings of Fact

1. John Peter Smith Hospital is and was at all times pertinent to this litigation a public, tax-supported hospital owned and operated by the Tarrant County Hospital District, a political subdivision of the State of Texas.

2. John Peter Smith Hospital is and was at all times pertinent to this litigation managed by the Board of Managers of the Tarrant County Hospital District, which board is composed of Julius Truelson, James C. Pollard, Harry Noah, George H. Moore, Robert L. McAfee, George J. Luibel, D.O. and Harold B. Daley. The administrator of the John Peter Smith Hospital is and was at all times pertinent to this litigation Tim Philpot. The medical director of John Peter Smith Hospital is and was at all times pertinent to this litigation William O. Hargrove, M.D. The director of the family practice residency training program at John Peter Smith Hospital is and was at all times pertinent to this litigation Bruce K. Jacobson, M.D., who also was the president of the Medical/Dental Staff of John Peter Smith Hospital in 1979.

3. All the plaintiffs are physicians duly licensed by the Board of Medical Examiners of the State of Texas and all plaintiffs have had two or more years of post-doctoral training in a program accredited by the American Osteopathic Association.

4. No doctor, either allopathic or osteopathic has a consitutional right to practice medicine at a public hospital. However, all physicians have a constitutional right to equal treatment as members of the same class.

5. For several years, the bylaws of the Medical/Dental Staff of John Peter Smith Hospital specifically required that a physician admitted to practice on the staff of John Peter Smith Hospital should have an M.D. degree and at various times made other requirements which would have limited staff membership to physicians with M.D. degrees.

6. On the 28th day of February, 1979, the Board of Mangers of John Peter Smith Hospital approved bylaws of the Medical/Dental Staff which abandoned the requirement of an M.D. degree but which provided that minimum requirements for admission to practice on the staff of the Hospital would be licensure by the State of Texas and two years of post-doctoral training in a program accredited by the Liaison Committee on Graduate Medical Education but provided for an exception to these minimum requirements upon the recommendation of a head of department and approval by the Executive Committee of the Medical/Dental Staff. The plaintiffs applied for privileges as members of the staff of John Peter Smith Hospital at a time when the plaintiff Stern initially was recommended by the head of the Department of Anesthesiology and approved for staff privileges by the Executive Committe of the Medical/Dental Staff. Upon presentation of that recommendation to the Board of Managers of the John Peter Smith Hospital, the attorney for the Board of Managers, an Assistant District Attorney of Tarrant County, recommended that specific guidelines for exceptions to any of the basic requirements for staff membership be considered and the approval or disapproval of the privileges of the plaintiff Stern were held in abeyance pending review of same by the Medical/Dental Staff. The Executive Committee of the Medical/Dental Staff withdrew its recommendation for approval of staff privileges for the plaintiff Stern and those privileges were denied by the Board of Managers of John Peter Smith Hospital. All other plaintiffs' requests for privileges were denied at every level of staff and Board of Managers' level of consideration. All appellate procedural

rights of the plaintiffs were pursued and at every level of appeal, the privileges were denied, it being stated, on behalf of John Peter Smith Hospital/Tarrant County Hospital District, that the sole reason for denial of privileges was the fact that the post-doctoral training of the plaintiffs was in a program which was not accredited by the Liaison Committee on Graduate Medical Education.

7. There presently exists and has existed at all times pertinent to this litigation an agreement between the Board of Managers of Tarrant County Hospital District and the Board of Regents of the University of Texas System for and on behalf of the University of Texas Southwestern Medical School at Dallas, Texas, an affiliation agreement providing for a Family Practice Residency Program established at John Peter Smith Hospital and administered by faculty of the medical school.

8. No plaintiff sought admission to the Teaching Staff of John Peter Smith Hospital.

9. There presently are on the Medical/Dental Staff of John Peter Smith Hospital, Tarrant County Hospital District, four osteopathic physicians all of whom obtained training approved by the Liaison Committee on Graduate Medical Education.

10. The Liaison Committee on Graduate Medical Education now known as the Accreditation Council for Graduate Medical Education replaced the Council on Medical Education of the American Medical Association in accrediting the post-doctoral programs of those institutions among others formerly accredited by the Council on Medical Education of the American Medical Association. The Liaison Committee on Graduate Medical Education came into existence in 1970.

11. Until recently osteopathic physicians were unable to obtain training in programs approved by the Liaison Committee on Graduate Medical Education. Today they are able to do

so in various governmental programs and certain other specialized programs.

12. The 1981 session of the Texas Legislature enacted a Medical Practice Act which prohibited hospital staff membership requirements at public hospitals being based upon the medical degree held by the physician and the State Board of Medical Examiners promulgated its rules recognizing the equality of both allopathic and osteopathic accrediting agencies.

13. The requirement that the post-doctoral training of a member of the Medical/Dental Staff of John Peter Smith Hospital be approved by the Liaison Committee on Graduate Medical Education, now known as the Accreditation Council for Graduate Medical Education, effectively excludes substantially all of the osteopathic physicians who reside in and pay taxes in Tarrant County from the Medical Dental Staff of John Peter Smith Hospital and totally excludes all osteopathic physicians whose post-graduate medical training occurred prior to 1970.

14. All post-graduate medical training in osteopathic institutions, in order to be accredited, must be approved by the American Osteopathic Association. The Liaison Committee on Graduate Medical Education, now known as Accreditation Council for Graduate Medical Education, accredits programs in institutions aligned with allopathic medicine only. The two accrediting programs are substantially the same and contain no significant differences.

15. All physicians in Texas who are licensed to practice general medicine have been licensed by the State Board of Medical Examiners whether they are osteopathic physicians (D.O.) or allopathic physicians (M.D.) and all physicians licensed to practice medicine in Texas, either osteopathic (D.O.) or allopathic (M.D.), are required to take and pass the same examination for licensure. The State Board of Medical

Examiners is composed of both allopathic (M.D.) and osteopathic (D.O.) physicians.

16. Post-graduate medical training programs approved by the Board of Medical Examiners of the State of Texas for licensure in the State of Texas are those which have been accredited by the American Osteopathic Association *or* the Liaison Committee on Graduate Medical Education (now known as Accreditation Council on Graduate Medical Education). The State Board of Medical Examiners recognizes accreditation of hospitals by the Joint Commission on Accreditation of Hospitals (allopathic) and the American Osteopathic Association (osteopathic). All post-graduate medical training programs approved by the American Osteopathic Association must be in institutions which are accredited by the American Osteopathic Association. All post-graduate medical training programs approved by the Liaison Committee on Graduate Medical Education (now ACGME) must be in institutions approved by the Joint Commission on Accreditation of Hospitals.

17. The Joint Commission on Accreditation of Hospitals and the Liaison Committee on Graduate Medical Education (now ACGME) primarily accredit institutions and programs aligned with allopathic (M.D.) medicine. The American Osteopathic Association approves hospitals and post-graduate medical training programs primarily aligned with osteopathic (D.O.) medicine.

18. The philosophical differences between allopathic medicine and osteopathic medicine are not sufficient to justify a differentiation between the two schools of medicine for purposes of medical staff privileges at a publicly owned and operated hospital.

19. The requirement that post-doctoral training for staff membership be accredited by the Liaison Committee on Graduate Medical Education (now known as the Accreditation Coun-

cil for Graduate Medical Education) is an arbitrary and false standard and is not a standard based upon a reasonable requirement and is primarily for the purpose of basing staff membership upon the holding of an academic medical degree of Doctor of Medicine as opposed to Doctor of Osteopathy.

20. The requirement that the post-doctoral training of staff members be approved by the Liaison Committee on Graduate Medical Education is not a requirement which has as a foundation a reasonable basis such as professional and ethical qualifications for the common good of the public or the hospital itself.

21. The evidence does not establish that there was a contract, conspiracy, or combination to deny the Plaintiffs staff privileges or to unreasonably restrain trade.

22. Any finding of fact which should be a conclusion of law is hereby a conclusion of law.

VIII.

Conclusions of Law

1. The Court has jurisdiction of this matter under 28 U.S.C. §§ 1331, 42 U.S.C. § 1983, 15 U.S.C. §§ 1-7, and 15 U.S.C. §§ 12-27.

2. Venue is proper in the Northern District of Texas, 28 U.S.C. § 1391(b).

3. 42 U.S.C. § 1983, and the Fourteenth Amendment of the Constitution of the United States do provide a basis for the injunctive relief as sought by the plaintiffs against the defendants in this case.

4. The conduct of the defendants in denying medical/dental staff privileges to the Plaintiffs on the basis of the provisions of Article 3, Section 3.11 of the Bylaws of the Medical/Dental Staff of John Peter Smith Hospital should be enjoined and the Board of Managers of John Peter Smith/Tarrant County

Hospital District should be required to grant to plaintiffs the requested staff privileges.

5. The antitrust statutes of the U.S. do not provide a basis for the injunctive relief as sought by the plaintiffs against the defendants in this case.

Judgment shall be entered accordingly.